United States Court of Appeals for the District of Columbia

APRIL TERM, 1939.

No. 7465

THE WASHINGTON TERMINAL COMPANY, APPELLANT,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, H. L. SCHUYLER, J. H. SMALLWOOD, E. J. COUGHLIN, F. J. CHRISMORE, G. J. YATES, B. B. YATES, JAMES G. EARLY, H. L. UTZ, L. W. THOMPSON, H. I. KINGMAN, W. H. McCOY, W. K. HARMAN, H. M. BEALL, C. M. ABELL, W. L. GROOMES, W. G. GAGE, N. E. KINGMAN, C. E. THORNE, L. G. FROCKE, H. S. YATES, H. H. WELCH, N. A. KELLY, F. C. BRANIGAN, R. EDELIN, R. G. MOLER, R. CARROLL, C. L. YEW, J. E. BROWN, L. H. CRAVEN, C. B. DIEDRICH, J. T. GREENE, JOHN A. MURPHY, J. F. MITCHELL, R. H. AYLOR, C. C. EVANS, H. E. JONES, R. L. MATTINGLY, O. W. SHEETS, W. L. STEWART, R. C. THOMAS, R. A. MILLION, C. M. GREENE, T. E. SMITH, T. L. MATTHEWS, T. E. BOLEN, C. C. WALSH, A. S. TALBOTT, P. F. CRAVEN, M. J. PALMISANO, C. T. CARTER, F. A. BABCOCK, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

INDEX.

	Original	Print
Caption	A	1
Complaint for declaratory judgment	1	2
Exhibit A	14	15
Exhibit B	17	18

	Original	Print
Exhibit C	19	20
Exhibit D	32	33
Exhibit E	39	40
Exhibit F	43	44
Answer of defendants	54	55
Order assigning defenses for advance hearing	62	61
Memorandum brief of defendants	63	63
Index	63	63
Memorandum brief	68	67
Plaintiff's memorandum of points and authorities, &c...	159	159
Table of contents	159	159
Memorandum of points and authorities	166	166
Defendant's memorandum of points and authorities, &c.	234	234
Index	235	235
Memorandum of points and authorities	236	236
Transcript of argument	261	261
Index	261	261
Proceedings—May 15, 1939	262	261
Proceedings—May 16, 1939	312	290
Order dismissing complaint	377	326
Notice of appeal	377	326
Memorandum: Cost bond ($250) on appeal—filed	377	326
Docket entries	378	327
Designation of record	379	328
Clerk's certificate	380	328

Proceedings in United States Court of Appeals for the District of Columbia		330
Minute entry of argument and submission		330
Opinion, Rutledge, J.		331
Dissenting opinion, Stephens, J.		348
Judgment		382
Designation of record		382
Clerk's certificate	(omitted in printing)	383
Order allowing certiorari		384

United States Court of Appeals for the District of Columbia

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a. District Court of the United States for the District of Columbia

Civil Action No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL., *Defendants.*

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

THE WASHINGTON TERMINAL COMPANY,
Union Station, Massachusetts Ave., N. E.,
Plaintiff,

vs.

F. E. BOSWELL,
E. R. BURKHEAD,
R. R. BRIDGES,
H. L. SCHUYLER,
J. H. SMALLWOOD,
E. J. COUGHLIN,
F. J. CHRISMORE,
G. J. YATES,
B. B. YATES,
JAMES G. EARLY,
H. L. UTZ,
L. W. THOMPSON,
H. I. KINGMAN,
W. H. McCOY,
W. K. HARMAN,
H. M. BEALL,
C. M. ABELL,
W. L. GROOMES,
W. G. GAGE,
N. E. KINGMAN,
C. E. THORNE,
L. G. FROCKE,
H. S. YATES,
H. H. WELCH,
N. A. KELLY,
F. C. BRANIGAN,
R. EDELIN,
R. G. MOLER,
R. CARROLL,
C. L. YEW,
J. E. BROWN,
L. H. CRAVEN,
C. B. DIEDRICH,
J. T. GREENE,
JOHN A. MURPHY,
J. F. MITCHELL,
R. H. AYLOR,
C. C. EVANS,
H. E. JONES,
R. L. MATTINGLY,
O. W. SHEETS,
W. L. STEWART,
R. C. THOMAS,
R. A. MILLION,
C. M. GREENE,
T. E. SMITH,
T. L. MATTHEWS,
T. E. BOLEN,
C. C. WALSH,
A. S. TALBOTT,
P. F. CRAVEN,
M. J. PALMISANO,
C. T. CARTER,
F. A. BABCOCK,
Defendants.

Filed December 29, 1938

CIVIL ACTION,
File No. 1165.

COMPLAINT FOR DECLARATORY JUDGMENT.

The plaintiff, The Washington Terminal Company, complains of the above named defendants and avers:

1. This is a suit of a civil nature for a declaration under the Declaratory Judgments Act (28 U. S. C. sec. 400) of the rights of the

plaintiff under a certain contract of February 1st, 1923, hereafter more specifically referred to in paragraph 4 hereof.

2. Plaintiff is a corporation duly incorporated and existing under the laws of the United States (Act of February 12, 1901, 31 Stat. 779; Act of February 28, 1903, 32 Stat. 773); is a resident of the District of Columbia, having its principal office and place of business in the District of Columbia located at Union Station, Massachusetts Avenue, North East, Washington, D. C.; and is engaged in the operation and management of a railroad terminal in the City of Washington.

3. Defendants are employees of the plaintiff performing service in the District of Columbia on properties of the plaintiff as enginemen and/or firemen engaged in operating or firing plaintiff's yard-engines which perform switching service in and about said Terminal. Defendants reside at the places listed opposite the name of each defendant as follows:

(1) F. E. Boswell, residing at 21 Franklin, Rogers Heights, Md.
(2) E. R. Burkhead, residing at 1650 W. Virginia Ave., N. E., Apt. #2, Washington, D. C.
(3) R. R. Bridges, residing at 312 18th St., N. E., Washington, D. C.
(4) H. L. Schuyler, residing at 64 Duncan Ave., Alexandria, Va.
(5) J. H. Smallwood, residing at 1825 Jackson St., N. E., Washington, D. C.
(6) E. J. Coughlin, residing at 4511 Ivy, Brentwood, Md.
(7) F. J. Chrismore, residing at 1326 Emerson St., N. E., Washington, D. C.
(8) G. J. Yates, residing at 5024 7th Place, N. W., Washington, D. C.
(9) B. B. Yates, residing at 3313 E St., S. E., Washington, D. C.
(10) James G. Early, residing at 1404 Lawrence St., N. E., Washington, D. C.
(11) H. L. Utz, residing at 3742 1st St., S. E., Washington, D. C.
(12) L. W. Thompson, residing at 25 Bayly Ave., Hyattsville, Md.
(13) H. I. Kingman, residing at 830 Valley St., Seat Pleasant, Md.
(14) W. H. McCoy, residing at 819 Bayly Ave., Hyattsville, Md.
(15) W. K. Harman, residing at 120 V St., N. E., Washington, D. C.
(16) H. M. Beall, residing at 26 Q St., N. E., Washington, D. C.
(17) C. M. Abell, residing at 1312 A St., S. E., Washington, D. C.
(18) W. L. Groomes, residing at 1316 Euclid St., N. W., Apt. No. 1, Washington, D. C.
(19) W. G. Gage, residing at 3753 W St., N. W., Washington, D. C.
(20) N. E. Kingman, residing at 830 Valley St., Seat Pleasant, Md.
(21) C. E. Thorne, residing at Oxon Hill, Md.
(22) L. G. Frocke, residing at 404 G St., N. E., Washington, D. C.
(23) H. S. Yates, residing at 1712 C St., N. E., Washington, D. C.
(24) H. H. Welch, residing at 4321 4th St., N. W., Washington, D. C.
(25) N. A. Kelly, residing at 135 12th St., N. E., Washington, D. C.
(26) F. C. Branigan, residing at 4205 20th St., N. E., Washington, D. C.
(27) R. Edelin, residing at 2331 3rd St., N. E., Washington, D. C.
(28) R. G. Moler, residing at 404 G St., N. E., Washington, D. C.
(29) R. Carroll, residing at 12 Virginia Ave., Brunswick, Md.
(30) C. L. Yew, residing at 819 Bayly Ave., Hyattsville, Md.
(31) J. E. Brown, residing at 628 8th St., N. E., Washington, D. C.
(32) L. H. Craven, residing at Hyattsville, Md.
(33) C. B. Diedrich, residing at 3201 Walnut St., N. E., Washington, D. C.
(34) J. T. Greene, residing at 1422 F St., N. E., Washington, D. C.
(35) John A. Murphy, residing at 931 7th St., N. E., Washington, D. C.

(36) J. F. Mitchell, residing at 1657 Trinidad Ave., N. E., Washington, D. C.
(37) R. H. Aylor, residing at 3742 1st St., S. E., Washington, D. C.
(38) C. C. Evans, residing at 312 A St., N. E., Washington, D. C.
(39) H. E. Jones, residing at 1509 V St., S. E., Washington, D. C.
(40) R. L. Mattingly, residing at Springfield, Va.
(41) O. W. Sheets, residing at Silver Spring, Md.
(42) W. O. Stewart, residing at 1423 Morse St., N. E., Washington, D. C.
(43) R. C. Thomas, residing at 40 V St., N. W., Washington, D. C.
(44) R. A. Million, residing at Capitol Heights, Md.
(45) C. M. Greene, residing at 1216 Massachusetts Ave., N. W., Washington, D. C.
(46) T. E. Smith, residing at 206 7th Ave., Brunswick, Md.
(47) T. L. Matthews, residing at Falls Church, Va.
(48) T. E. Bolen, residing at R. F. D. 4, Anacostia, D. C.
(49) C. C. Walsh, residing at 904 D St., S. W., Washington, D. C.
(50) A. S. Talbott, residing at 1316 Euclid St., N. W., Washington, D. C.
(51) P. F. Craven, residing at 534 1st St., S. E., Washington, D. C.
(52) M. J. Palmisano, residing at 421 2nd St., N. E., Washington, D. C.
(53) C. T. Carter, residing at 421 2nd St., N. E., Washington, D. C.
(54) F. A. Babcock, residing at 608 A St., S. E., Washington, D. C.

4. An actual controversy exists between plaintiff and said defendants and each of them concerning the rights of the plaintiff and said defendants under a certain contract or agreement entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen" entered into on or about February 1, 1923, by and between the plaintiff and its employees of the classes to which defendants belong, said employees being represented in the making of said contract by the General Chairman of the Brotherhood of Locomotive Engineers and the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen respectively; said controversy having resulted from a purported award of the National Railroad Adjustment Board, First Division, (Award No. 3115, Docket No. 5059) rendered October 24, 1938, purporting to interpret and apply said contract; subsequent to which award defendants have made and are now making demands upon plaintiff for payments of sums of money under said contract which plaintiff claims and hereby avers to be not lawfully due or owing under said contract.

5. Plaintiff is engaged in the management and operation of railroad terminal facilities which include a passenger station known as the Union Station, Washington, various tracks and switches over which passenger trains enter and leave said terminal, a yard where the coaches and other cars comprising such passenger trains are stored during the interval between the time when such trains arrive at the passenger station and depart therefrom, and an enginehouse where locomotives are kept when not in use.

6. The Washington Union Passenger Station and other facilities of plaintiff were constructed under the authority of Acts of Congress approved February 12, 1901 (31 Stat. at L. Page 774) and February 28, 1903 (32 Stat. at L. Page 773) for the purpose of providing a single convenient passenger station for all railroads entering the City of Washington, and said passenger station was first opened for general use November 17, 1907, since which date all passenger trains serving

the City of Washington have entered into or departed from said Union Station.

7. Plaintiff operates no passenger trains and employs no road engine or road train crews and all passenger trains which enter and depart from said Union Passenger Station belong to and are operated by one or more of certain railroad companies known as and hereafter referred to as the Tenant Lines, said lines being The Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company. All said passenger trains operate for the major portion of their runs on the tracks of one or more of said Tenant Lines between Washington and various other cities of the country and use the tracks and facilities of the plaintiff for only a short distance in entering and leaving said passenger station.

5 8. The movement of loaded passenger trains from points outside of Washington into the Washington Union Station, from the Washington Union Station to points outside of Washington, and through the Washington Union Station from a point outside of Washington to another point, are performed and have always, since the opening of the Terminal for general use on or about November 17, 1907, been performed exclusively by road engines manned by road engine crews employed by said Tenant Lines.

9. When passenger trains commence or terminate their runs at Washington the road engine crews of the Tenant Lines are required and always have been required by the Tenant Lines to deliver the road engine to the enginehouse at the end of a run and to bring the road engine from the enginehouse to the Station at the commencement of a run, respectively. Said road engines when so operated over the plaintiff's tracks between the Station and the enginehouse are and always have been manned by road engine crews employed by the Tenant Lines.

10. In addition to the movement of loaded passenger trains into, out of, and through the Washington Union Passenger Station, certain other movements of equipment take place over the tracks of the plaintiff, as follows: Empty passenger trains which have discharged their passengers at the Station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the Station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have come into the Station one or more cars are sometimes cut off from the head end of said train and removed in a single movement to some designated track; where a train of passenger cars is standing in the Station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of said train on its journey over the road; when trains of passenger cars have come into the Station and discharged their passengers, said empty trains are sometimes moved a sufficient distance to permit the road engine which has brought such train into the Station to be uncoupled from the train and proceed by a crossover movement to another track. Many movements of the kinds heretofore described in this paragraph are and always have been, since the commencement of operation of said ter-

minal in 1907, performed, where in the judgment of the managing officers of the plaintiff efficiency or promptness in the operation of the terminal is thereby promoted, by the use of the road engine which has brought such train into the Station or is about to haul such train to its destination, incidental to the movement of such road engine between the station and the enginehouse; and in making such movements such road engines are and always have been manned by the road engine crew which is required as part of its duties to deliver said road engine to the enginehouse at the completion of a run and to bring such road engine from the enginehouse to the station at the commencement of a run.

11. Movements over the tracks of the plaintiff other than movements of the kind described in paragraphs 9 and 10 above are made and have been generally made by yard engines of the plaintiff manned by yard engine crews employed by the plaintiff.

12. On or about June 1, 1910, the plaintiff published certain rules and regulations for the government of the yard engine firemen in plaintiff's employ, defining the terms of the employment and the rights of said employes thereunder, which rules and regulations are set forth in full in Exhibit A attached hereto and are made a part hereof as fully as if set forth in this paragraph.

13. On or about September 1, 1911, the plaintiff published certain rules and regulations for the government of yard enginemen in plaintiff's employ, defining the terms of the employment and the rights of the employes thereunder, which rules and regulations are set forth in Exhibit B attached hereto and are made a part hereof as fully as if set forth in this paragraph.

14. Said regulations defining the employment of yard firemen and enginemen in plaintiff's employ continued in effect until December 1, 1919, when the same were superseded by a "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" entered into by and between the Director General of Railroads of the United States on behalf of the Washington Terminal Railroad and the enginemen, firemen and trainmen employed thereon represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Brotherhood of Railroad Trainmen, respectively, which said schedule is set forth in full as Exhibit C hereto and made a part hereof as fully as if set forth in this paragraph.

15. Subsequently thereto on or about February 1, 1923, the plaintiff entered into an agreement with the yard enginemen and yard firemen in its employ represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, respectively, which agreement, entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen" is set forth in full as Exhibit D hereto and made a part hereof as fully as if set forth in this paragraph, and which agreement remains and has remained since February 1, 1923, in effect as the only contract existing between the plaintiff and the enginemen and firemen in its employ, including the defendants herein, defining the terms of employment of said enginemen and firemen.

16. Said "Regulations and Rates of Pay for the Government of Firemen" of June 1, 1910 (Exhibit A), "Regulations and Rates of Pay for the Government of Enginemen" of September 1, 1911 (Exhibit B), "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" of December 1, 1919 (Exhibit C), and "Schedule of Rules and Rates of Pay for Enginemen and Firemen" of February 1, 1923 (Exhibit D), all contain substantially similar provisions establishing certain rights of seniority as between plaintiff's employes belonging to each respective class covered by said regulations or schedules, said provisions, among other things, entitling the employes of a given class to vacancies and new runs in the order of seniority of the applicants, providing for seniority as a factor in promotion and according recognition in similar respects to length of service in a particular employment, said provisions being more specifically identified by reference to the Exhibits attached hereto as follows:

Exhibit A, paragraphs 1, 2, 3, 21, 22, 26, 30, 32
Exhibit B, paragraphs 1, 2, 5, 19, 21, 22, 24
Exhibit C, Article 8, Article 9
Exhibit D, Article 8, Article 9

17. At the date when the first of said above mentioned regulations and schedules, to wit, the regulations of June 1, 1910 (Exhibit A) went into effect, and continuously thereafter during the entire period when said various regulations and schedules above referred to were successively in force and effect, and continuously during the period since said schedule of February 1, 1923, (Exhibit D) has been in effect, the uniform and continuous usage and practice has been for movements of the character described in paragraph 10 above to be made by road engines manned by road crews employed by the Tenant Lines whenever in the judgment of plaintiff's managing officials efficiency or promptness in the operation of the Terminal was thereby promoted, and a large proportion of such movements have always been and are being so performed by the use of road engines manned by road engine crews employed by said Tenant Lines.

18. By Act of Congress of June 21, 1934, U. S. C. A. Title 45, Sec. 153, entitled "An Act to Amend the Railway Labor Act Approved May 20, 1926, and to Provide for the Prompt Disposition of Disputes Between Carriers and Their Employes", there was established a Board known as the "National Railroad Adjustment Board" with jurisdiction over disputes growing out of the interpretation or application of agreements between railroads and their employes concerning rates of pay, rules or working conditions after such disputes shall have been handled by negotiations up to and including the chief operating officer of the carrier designated to handle such disputes in the event that such negotiations shall have failed to result in adjustment. It was further provided in said Act that said Adjustment Board should be composed of four divisions of which the First Division should have jurisdiction over disputes involving yard and train service employes, including engineers, firemen, conductors, trainmen, and yard service employes. It was provided that said First Division should consist of ten members, five of whom should be selected and designated by the carriers and five of

whom should be selected and designated by national labor unions of employes, and said Board and said First Division thereof were thereafter organized.

19. Thereafter there was presented to the plaintiff by representatives of the firemen, enginemen and trainmen employed by the plaintiff a claim to the effect that certain work being performed on the property of the plaintiff by road engines manned by road engine crews of the Tenant Lines as above described in paragraph 10 hereof was work to which yard engine crews employed by the plaintiff were alleged to be exclusively entitled by reason of seniority rights under said agreement of February 1, 1923, above referred to (Exhibit D hereto), and after negotiations between said representatives and plaintiff had failed to result in agreement said representatives on March 29, 1937, invited the plaintiff to join with them in the submission of the said claim to the National Railroad Adjustment Board, First Division, which plaintiff declined to do on the ground that said claim was not based on any violation of any agreement and amounted to a demand that operating practices should be abandoned which had always existed continuously since the commencement of the operation of the Terminal. Notwithstanding such refusal by plaintiff to join voluntarily in the submission of said claim to said National Railroad Adjustment Board, a claim was thereafter filed by said representatives of said employes with said National Railroad Adjustment Board, First Division, the statement of said claim reading in part as follows:

"Statement of Claim:

"It is the practice of The Washington Terminal Company to require tenant line road engines manned by tenant line road engine crews to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot and perform other switching service on tracks of the Washington Terminal Company. . . . Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

20. Thereafter the plaintiff was notified and required by the National Railroad Adjustment Board, First Division, in accordance with its rules as hereto attached and made a part hereof as Exhibit E, to file its "submission" in answer to the claim set forth in paragraph 19 above within thirty days after the claim was filed with said Board and within said thirty days the plaintiff filed its submissions with the Board.

21. Thereafter said National Railroad Adjustment Board, First Division, set a date upon which plaintiff and representatives of the firemen, enginemen and trainmen employed by the plaintiff were notified to appear before it in connection with the claim above referred to.

22. On said date, said representatives of the employes and a representative of the plaintiff appeared before said Board at Chicago, Illinois. In accordance with the established procedure of said National Railroad Adjustment Board, First Division, no witnesses were called to testify and no evidence was produced of the facts relied upon by the representatives of the employes in support of the aforesaid claim, but

said representatives of the employes made certain statements which they alleged to be facts and which were received by the Board without any opportunity being given to the plaintiff to cross-examine the said representatives or otherwise to test the competency of the said statements or verify their existence as facts.

23. At hearings before said Board the established procedure of said Board affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence in resisting such claims and the established procedure of said Board makes no provision for and does not permit the making of any record, stenographic or otherwise, of the proceedings before said Board. In accordance with said procedure no opportunity was given to the plaintiff to produce witnesses or by any other means to introduce evidence in resisting the claim presented by the representatives of said employes and no record was made of said hearing.

24. Thereafter said Board was apparently unable to reach a determination of the aforesaid claim through deadlock or inability to secure a majority vote of Division members and acting under the provisions of Paragraph (l) of Section 3 of said Railway Labor Act designated a referee to determine the said matter.

25. In accordance with the established practice of said Board no opportunity was given to the plaintiff to appear before the said referee and defend itself against said claim either by the presentation of evidence or argument, or to present written argument to said referee, and the plaintiff was not notified by said Board that a referee had been designated to make an Award.

26. Thereafter said referee decided said claim in favor of the employes and said decision was adopted, promulgated and published by the National Railroad Adjustment Board in the form hereto attached as Exhibit "F", consisting of a complete verbatim reproduction of the *ex parte* submission of the employes filed with the Board, a complete verbatim reproduction of plaintiff's submission likewise filed with the Board, followed by the words set forth below:

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket, is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

"Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By order of First Division

ATTEST (s) T. S. McFARLAND

Secretary."

"Dated at Chicago, Illinois, this 24th day of October, 1938."

27. Thereafter said National Railroad Adjustment Board, First Division served upon the plaintiff an Order dated October 24th, 1938 in words and figures as follows:

"Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

ORDER

To accompany { Award No. 3115
Docket No. 5059

To: THE WASHINGTON TERMINAL COMPANY

MR. B. R. TOLSON, *Manager*,
Union Station, Washington, D. C.

The WASHINGTON TERMINAL COMPANY

is hereby ordered to make effective Award No. 3115, made by the First Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before November 23rd, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of First Division

ATTEST: (Sgd) T. S. MCFARLAND,
Secretary.

Dated at Chicago, Illinois, this 24th day of October, 1938."

28. Plaintiff has not complied with said Order, but since the date thereof movements of the character referred to in paragraph 10 above have continued to be made, where in the judgment of the managing officers of the plaintiff, promptness or efficiency in the operation of said Terminal would be thereby promoted, by road engines manned by road engine crews of the Tenant Lines as has been the continuous practice since the commencement of the operation of the Terminal; and accordingly under paragraph (p) of Section 3 of the Railway Labor Act, (U. S. C. Title 45, Sec. 153), the defendants herein or any of them, as firemen or enginemen employed by the plaintiff in the operation of its yard engines and therefore as persons for whose benefit said Order was made, have been at all times since the date of said order, and are, authorized and empowered to file in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which any such employe resides, a petition praying said Court to make such order and enter such judgment as may be appropriate to enforce said order and in such proceeding said Court is empowered to make such order and enter such judgment as it may determine to be proper to enforce *or set aside* said order; but none of the defendants has heretofore filed such petition in this or any other District Court of the United States.

29. Notwithstanding that none of the defendants herein has instituted any proceeding in any competent court under section 3 (p) of said Railway Labor Act wherein plaintiff would have opportunity and be entitled to show that the defendants do not have any right under said contract of February 1, 1923 (Exhibit D) or otherwise, to perform movements of the character described in paragraph 10 above, and wherein plaintiff might pray said court to set aside said order of the National Railroad Adjustment Board, First Division, of October 24, 1938, as unlawful, invalid and in excess of the jurisdiction of said Board, none-the-less said defendants and each of them have, beginning November 23, 1938, presented, and are continuing to present to plaintiff claims and demands for sums of money other than the full day's wages which said defendants earn for each day on which they actually do any work, said demands being based upon their alleged right to perform movements of the character described in paragraph 10 above, which movements they are not in fact performing but which are being performed by road engine crews of the Tenant Lines. Said demands so made upon the plaintiff by defendants are in the nature of claims for penalty payments and are in excess of the amounts which such defendants would earn if they actually performed work of the character to which they claim they are entitled, many such demands being for another full day's pay in addition to the full day's pay which claimants are already earning, said claim for such extra day's pay being based upon the fact that the claimant has not been given an opportunity to perform some one specific movement of the character mentioned in paragraph 10 above, the performance of which movement would involve only a few minutes work. Such claims and demands are rapidly accumulating from day to day and already amount for the period beginning November 23, 1938, to a total of approximately $7,500.00 or at the rate of approximately $80,000.00 per annum.

30. Said claim of defendants that yard engine crews employed by plaintiff have an exclusive right to perform movements of the character described in paragraph 10 above, on which claim the demands of the defendants for the money payments mentioned in paragraph 28 above are based, is not legally supported by the provisions of said contract of February 1, 1923, above referred to (Plaintiff Exhibit D), or any other contract between plaintiff and defendants, or to the benefits of which defendants are entitled.

31. Said claim of defendants that yard engine crews employed by plaintiff have an exclusive right to perform such work is not legally supported by said award and order of said National Railroad Adjustment Board of October 24, 1938, because said award and order insofar as they purport or attempt to create such a right are unlawful, invalid, void and in excess of the jurisdiction of said Board for the following reasons:

(a) Said award and order purport to establish rights and impose obligations not founded upon any contract between the plaintiff and its employes, but are contrary to and in conflict with said contract of February 1, 1923 (Plaintiff Exhibit D), and amount to an attempt by said Board to impose upon plaintiff and its employees a new and dif-

ferent contract from that which exists between them, which is in excess of the jurisdiction of said Board to do, and would constitute a deprivation of plaintiff's liberty and property without due process of law in violation of the provisions of Article V of the Constitution of the United States;

(b) Said award and order were made without the due process of law to which plaintiff is entitled under said Article V of the Constitution of the United States in that they were made without a proper or adequate hearing, because made under a procedure which allowed plaintiff no opportunity to test the statements of the claimants by cross-examination, no opportunity to present oral evidence before said Board, and no opportunity to present argument before the referee who decided the dispute and made the award;

(c) Said award and order are totally unsupported by the facts set forth in plaintiff's Exhibit F, which constitutes the only record, or substitute for a record, of the proceedings before said Board on which said order and award purport to be based;

(d) Said award and order made by the National Railroad Adjustment Board were not made by a tribunal exercising judicial power under Article III of the Constitution of the United States and said Board cannot consistently with said Article III of the Constitution of the United States be vested with jurisdiction to construe finally and conclusively the contract rights existing between plaintiff and its employees or other private persons.

32. Plaintiff is without an adequate and complete remedy at law in the premises, and for want of such remedy is subjected to serious damage and inconvenience, for the following reasons, to wit:

None of the defendants has at this time instituted any judicial proceeding wherein plaintiff would have the opportunity and right to show that defendants do not have any right under said contract of February 1, 1923 (Exhibit D hereto) or otherwise to perform movements of the character as to which they claim such right, and there is no means by which plaintiff can force or induce the defendants or any of them to institute such proceedings. Said Railway Labor Act provides no method whereby plaintiff may petition any court of competent jurisdiction to set aside said award and order of said National Railroad Adjustment Board, First Division, as a result of which award the defendants have made and are continuing to make the demands for money payments mentioned in paragraph 28 above and meanwhile said demands are accruing and accumulating from day to day in large amounts. Plaintiff states that although the issues upon which the validity of said demands and the liability of plaintiff to satisfy them are as a matter of evidence and proof capable of determination at this time, the plaintiff by reason of there being no judicial determination of plaintiff's liabilities with respect to such demands is compelled to maintain and make available substantial amounts of money to satisfy said demands in the event that the defendants or any of them should subsequently institute legal proceedings to enforce said award and order, and in the event it should in such proceedings be determined that the plaintiff is legally liable with respect thereto. Furthermore, plaintiff if advised at the present

time by proper judicial construction of its rights and liabilities under its contract with the defendants would, if necessary, be enabled by making readjustments of its operating arrangements to fulfill its obligations to defendants at less expense than by incurring the heavy penalty payments which the defendants are now demanding. Plaintiff further avers that so long as the defendants continue to make such demands without instituting legal proceedings wherein the validity of such demands can be adjudicated, and so long as the present controversy between the plaintiff and defendants with respect to their respective rights and liabilities under the contract which exists between them remain without judicial determination, a serious impediment exists to the proper and adequate fulfillment of plaintiff's obligation to serve the public which may, as a result of delay in securing an adjudication that will settle such controversy, ultimately impair and interrupt the performance of such service.

13

33. The plaintiff avers that by reason of each and all the facts aforesaid the only remedy of this plaintiff, in order to avoid irreparable injury and damage, is to bring this suit in equity in this Honorable Court, praying a declaratory judgment or decree on the part of this Court relative to the actual controversy hereinbefore set out, and a declaration of the rights and other legal relations of the parties hereto, with respect to such controversy.

Wherefore, plaintiff prays your Honorable Court to render a declaratory decree or judgment declaring that the contract between the plaintiff and the classes of employees of which defendants are members, dated February 1, 1923 (Exhibit D hereof) does not give to the said defendants the right to perform the work of: (a) moving empty passenger trains which have discharged their passengers at the Station to the storage yard; (b) moving trains of empty passenger cars from the Storage Yard to the Station for the purpose of taking on passengers and leaving for their destination; (c) cutting off one or more cars from the head end of a train of passenger cars that has come into the Station and moving the said car or cars in one movement to a designated track; (d) moving one or more cars from a track and placing the same against and coupling said car or cars onto a train of passenger cars standing in the Station so as to form a part of the said train departing from the Station on its journey over the road; (e) moving empty passenger trains which have come into the Station and from which the passengers have been discharged a sufficient distance to permit the road engine which has brought such train into the Station to be uncoupled from the said train and to proceed by a crossover movement to another track;

And further declaring that plaintiff has the right under the said contract to continue to permit the said movements to be made by road engines of the Tenant Lines manned by road engine crews employed by the Tenant Lines wherever said movements by said Tenant Line road engines and road engine crews, in the judgment of the officers of the plaintiff, will promote efficiency or promptness in the operation of the Terminal;

And further declaring that said Award No. 3115, Docket 5059 and Order of the National Railroad Adjustment Board, First Division,

entered thereon, do not lawfully confer any right upon the defendants to perform the work of making such movements, and that said Award and Order in so far as they purport to confer any such right are invalid and of no legal force and effect;

And further declaring that the defendants herein have no legal right to perform the work of making such movements or any of them;

And further declaring that the claims and demands made by the defendants upon the plaintiff for the payment of money for movements of the character above described, which movements defendants have not been assigned to make but which have been made by road engines manned by road engine crews employed by the Tenant Lines, are invalid and unlawful, and that the plaintiff is under no legal liability to satisfy such claims or demands, or any of them;

And further declaring the rights and other legal relations of the plaintiff and defendants as herein averred and granting to this plaintiff such further relief as to this Court may seem meet and proper in the premises.

Sydney R. Prince Jr

[redacted]

Guy W Knight

[redacted]

John Dunkinson

[redacted]

Solicitors for Plaintiffs.

Dated at Washington, D. C.
this 29th day of December, 1938.

EXHIBIT A.

THE WASHINGTON TERMINAL COMPANY

REGULATIONS AND RATES OF PAY FOR THE GOVERNMENT OF FIREMEN

RATES OF PAY EFFECTIVE JUNE 1, 1910

REGULATIONS EFFECTIVE MAY 1, 1911

15

THE FOLLOWING RULES AND REGULATIONS ARE FOR THE GOVERNMENT OF WASHINGTON TERMINAL FIREMEN.

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1. Ability, fitness and seniority entitle firemen to promotion as opportunity may offer. The Superintendent shall decide whether the candidate or applicant is qualified therefor. Firemen passed around for promotion will, if they so desire, be informed, upon request to the Superintendent, the reason for so doing.

2. A fireman cannot make application for the run that he has just vacated, but if the run is vacated by the man who fills his vacancy, he may then make application, and his application must be considered. Demoted enginemen will be given runs to which their seniority entitles them.

3. Firemen successfully passing the necessary examination for promotion to enginemen shall receive a letter to that effect, signed by the Superintendent.

4. Firemen will be considered in connection with special duty pertaining to locomotives.

5. All extra firemen will be run first in, first out.

6. Firemen accepting promotion to official positions may retain their seniority as firemen.

Firemen in yard service will receive not less than 26 cents per hour.

7. Ten hours or less shall constitute a day; overtime at regular hourly rates. Overtime to be computed for each employe on the basis of actual overtime worked or held for duty, allowing time to the nearest tenth of an hour.

8. Regularly assigned firemen will not be used for extra service when competent extra firemen are available.

9. Firemen of single-crewed yard engines will report for duty within such time to reach the appointed place, and will be paid to the nearest tenth of an hour, with a maximum of thirty minutes in addition to the regular day's pay for reporting in advance of commencing day's work.

10. Regularly assigned firemen reporting for duty and through no fault of their own not used as assigned, will be paid for the time held on duty; a minimum of ten hours will be allowed.

11. Firemen used as pilots will receive engineman's pay.

12. Firemen called as witnesses in court or to attend an inquest, in the interest of the railroad company, will be allowed time for same, with a minimum of one day; also traveling expenses and board when away from home.

13. Firemen required to do any work outside of their regularly assigned duties will be paid their regular wages, except when filling positions that pay a higher rate, they will receive the higher rate.

14. One hour without pay will be allowed for meals between the hours of 11.00 A. M. and 1.00 A. M. or P. M. for yard firemen working between the hours of 6.00 A. M. and 7.00 P. M., or between the hours of 6.00 P. M. and 7.00 A. M. If not relieved for meals until 12.30 A. M. or P. M., they will be given thirty minutes within which to eat and be paid for the hour.

One hour without pay will be allowed for meals between the hours of 6.00 P. M. and 8.00 P. M. or A. M. for yard firemen working between the hours of 12.00 noon or midnight, and 1.00 A. M. or P. M. If not relieved for meals until 7.30 P. M. or A. M., they will be given thirty minutes within which to eat and be paid for the hour.

15. When time claimed is not allowed, firemen will be notified in writing, and the reason therefor given.

16. When yard firemen are required to report for investigation after having finished their work they shall be given an audience promptly after being relieved. If found not guilty they will be allowed time held for investigation at their regular hourly rates.

17. If a yard fireman should consider that an injustice has been done him he should appeal in writing to the Superintendent within ten days.

18. Yard firemen relieved from service, through reduction of force, will be given preference in re-employment if available, and previous service has been satisfactory.

19. In filling positions that can be taken by permanently disabled yard firemen preference will be given such employes as are capable of performing the service.

20. Awnings will be placed on all yard engines in yard service and substantial arrangements shall be attached to all engines to afford the firemen protection against inclement weather.

21. A classified roster will be posted once a year in the Round House, giving dates of employment of firemen and the dates of their promotion.

22. Firemen transferred from the P. B. & W. R. R. Co., B. & O. R. R. Co., and Southern Railway Co. to the Washington Terminal Company will be given seniority as is shown on the official roster, dated May 1, 1911.

23. Water coolers and tin cups will be placed on all yard engines in yard service and ice will be furnished from April 1st to October 1st.

24. Firemen eligible for promotion to enginemen will be given three examinations; failing to pass the first examination, they will be allowed thirty days to prepare for the second examination, and failing to pass the second examination will be allowed an additional thirty days to prepare themselves. If they successfully pass the second or third examination they will be senior to any junior firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination they will be dropped back to the youngest extra fireman, and can only come up again in their turn. This shall not be retroactive. Firemen entitled to promotion who are injured or unable to take the examination by reason of sickness, suspension or leave of absence shall not lose their turn thereby.

25. Firemen who have been in the Company's service six months, will, if they so desire, be given service letter by the Superintendent when leaving the service, which they must sign when presented.

26. A fireman may be given ninety days furlough and at the expiration of that time may, upon making application to his proper officer, resume his employment without losing his seniority.

27. Yard firemen will report for duty and be relieved, as nearly as practicable, at specified points; when not so relieved they will be considered on duty. Yard firemen waiting at specified relieving points will be considered on duty.

28. A squirt hose will be maintained on all yard engines at all times.

29. Firemen will not be required to polish brass, clean engines, black front ends or clean fires, but they may do so. Firemen will be required to keep the woodwork and all parts inside of cab, including glass inside and outside of cab, in a cleanly condition, in the judgment of the General Foreman.

They will not be required to fill lamps. This regulation is not to be construed as relieving firemen from knowing that all lamps and signals required are in serviceable condition at all times.

30. New runs and permanent vacancies in yard engine crews, will be advertised on bulletin board for five days, and at the expiration of that time given to the oldest fireman in the service making application in writing, if, in the judgment of the Superintendent, he is qualified therefor. Failure to make application in writing for a new run or position precludes promotion to that run or position.

17

Firemen making application for a new run or vacancy must file the same with the officer signing the advertisement, and will receive acknowledgment thereof from him.

31. Firemen will not be required to cut hose, cut engines, or throw switches, but they may do so in emergencies.

32. Promoted firemen shall hold their regular assignments firing and be worked first in first out on the extra engineman's list until they receive regular assignment as enginemen; seniority to rank from date of promotion.

33. Yard firemen will not be suspended nor dismissed from the Company's service without a fair and impartial trial; neither will they be suspended for minor offences pending investigation or decision. Witnesses will be examined separately, but in the event of conflicting testimony those whose evidence conflicts will be examined together.

34. Any engineman, fireman or hostler who considers that an injustice has been done him, and having appealed his case in writing to the Superintendent, and after his appeal has been acted upon by the Superintendent may, if he so desires, be represented before the Superintendent by a committee representing the firemen, except in case of an engineman such committee should consist of promoted men.

A. M. KEPPEL,
Superintendent.

EXHIBIT B.

THE WASHINGTON TERMINAL COMPANY

REGULATIONS AND RATES OF PAY FOR THE GOVERNMENT OF ENGINEMEN

RATES OF PAY EFFECTIVE SEPT. 1, 1911

REGULATIONS EFFECTIVE MARCH 1, 1912

THE FOLLOWING RULES AND REGULATIONS ARE FOR THE GOVERNMENT OF WASHINGTON TERMINAL ENGINEMEN.

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1. Ability, fitness and seniority will entitle enginemen to promotion as opportunity may offer.

2. New runs, permanent vacancies and working hours of any run permanently changed will be advertised on the bulletin board for five days, and at the expiration of that time given to the oldest engineman making application in writing, if in the judgment of the Superintendent, he is qualified therefor.

3. Regularly assigned enginemen will not be used for extra service when extra enginemen are available.

4. Enginemen assigned to regular yard work will be assigned to regular engines. This arrangement will be varied from as may be necessary.

5. In reduction of force, seniority will prevail.

6. Enginemen will be considered in connection with special duty pertaining to locomotives.

7. Ten hours or less shall constitute a day; overtime at regular hourly rates. Only full hours will be counted; thirty minutes or more will be counted one hour, less than thirty minutes will not be counted.

8. Enginemen when called for duty and not used, through no fault of their own, will be paid for three hours.

9. Enginemen of single-crewed yard engines will report for duty at the appointed time, and will receive one half hour's pay in addition to regular day's pay for preparatory work.

10. Enginemen in yard service will receive not less than 41.5 cents per hour.

11. Enginemen will not be suspended nor dismissed from the company's service without a fair and impartial trial. Neither will they be suspended for minor offences pending investigation or decision. Witnesses will be examined separately, but in event of conflicting testi-

mony, those whose evidence conflicts will be examined together. Enginemen will receive five days notice prior to the date suspension takes effect. If an engineman should consider that an injustice has been done him, he should appeal in writing to the Superintendent within five days.

12. Enginemen called as witnesses at court or to attend an inquest, in the interest of the railroad company, will be allowed time for same, with a minimum of one day; also traveling expenses and board when away from home.

13. Enginemen will not be required to fill grease cups on yard engines. They must report when this attention is necessary.

14. One hour without pay will be allowed for meals between the hours of 11.00 A. M. and 1.00 A. M., or P. M., for yard enginemen working between the hours of 6.00 A. M. and 7.00 P. M., or between the hours of 6.00 P. M. and 7.00 A. M. If not relieved for meals until 12.30 A. M. or P. M., they will be given thirty minutes within which to eat and be paid for the hour.

One hour without pay will be allowed for meals between the hours of 6.00 P. M. and 8.00 P. M. or A. M. for yard enginemen working between the hours of 12.00 noon and midnight and 1.00 A. M. or P. M. If not relieved for meals until 7.30 P. M. or A. M., they will be given thirty minutes within which to eat and be paid for the hour.

19

15. When time claimed is not allowed, enginemen will be notified in writing and the reason therefor given.

16. When yard enginemen are required to report for investigation after having finished their work they will be given an audience promptly after being relieved. If found not guilty they will be allowed time held for investigation at their regular hourly rates.

17. Enginemen will not be required to report more than six hours before going on duty after being absent.

18. When working hours of any run are changed, causing same to be advertised, the engineman holding run prior to change will be permitted to hold run during advertisement.

19. Temporary vacancies for any cause known to be thirty days or more will be advertised for three days and given to the oldest engineman making application in writing, if in the judgment of the Superintendent he is qualified therefor. This is known to be only a temporary assignment.

20. When enginemen are absent for any cause when vacancies are advertised in accordance with Rules 2 and 19, they will be permitted to make application for vacancies advertised during their absence, provided they do so within five days after returning to work.

21. A classified roster will be posted once a year in the Engine House, giving dates of employment of enginemen and the dates of their promotion.

22. Enginemen transferred from the P. B. & W. R. R. Co., B. & O. R. R. Co., and Southern Railway Company to the Washington Terminal Company will be given seniority as is shown on the official roster dated February 1, 1912.

23. Water coolers and tin cups will be placed on all yard engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be provided on all yard engines.

24. An engineman may be given ninety days furlough and at the expiration of that time may, upon making application to his proper officer, resume his employment without losing his seniority.

25. Yard enginemen will report for duty and be relieved as nearly as practical at specified points. When not so relieved, they will be considered on duty. Yard enginemen waiting at specified relieving points will also be considered on duty.

A. M. KEPPEL,
Superintendent.

EXHIBIT C.

UNITED STATES RAILROAD ADMINISTRATION

DIRECTOR GENERAL OF RAILROADS

WASHINGTON TERMINAL RAILROAD

SCHEDULE OF

RULES AND RATES OF PAY

FOR

ENGINEMEN, FIREMAN AND YARDMEN

(IN THE OPERATION OF TRAINS OR ENGINES PROPELLED BY STEAM OR OTHER MOTIVE POWER)

EFFECTIVE DECEMBER 1, 1919

ARTICLE 1.

RATES OF PAY.

Weight on drivers	(per day)	(per day)	(per day)
Less than 140,000 lbs.	$5.60	$4.16	$4.16
140,000 to 200,000 lbs.	$5.76	$4.28	$4.16
200,000 to 300,000 lbs.	$5.92	$4.40	$4.16
300,000 and over	$6.08	$4.56	$4.32
Mallets under 275,000 lbs.	$6.68	$5.28	....
Mallets 275,000 lbs. and over	$6.92	$5.52	....
Inside Hostlers			$4.16
Outside Hostlers			$4.80
Hostler Helpers			$3.60
Conductors			$5.33
Brakemen			$5.00
Switchtenders			$4.00

ARTICLE 2.

BASIC DAY.

Eight hours or less shall constitute a day's work.

ARTICLE 3.

OVERTIME.

Except when changing off, where it is the practice to work alternately days and nights for certain periods; working through two shifts

to change off; or where exercising seniority rights from one assignment to another; or when extra men are required to be used by schedule rules—any rules to the contrary to be changed accordingly—all time worked in excess of eight hours continuous service in a twenty-four-hour period shall be paid for as overtime on the minute basis at one and one-half times the hourly rate.

EXAMPLE.

What compensation should be allowed for additional service where a crew is regularly assigned to work 12 midnight to 8 a.m. and (service performed not affected by exceptions outlined in this rule):

Question. (a) Is required to cover the third shift on the same day 4.00 p.m. to 12 midnight?

Answer. (a) Eight hours at time and one-half.

Question. (b) Is required in an emergency to work 8.30 a.m., until 11.30 a.m.?

Answer. (b) Eight hours at time and one-half.

Question. (c) Is required in an emergency to work 8 p.m. to 12 midnight (four hours) on the same day?

Answer. (c) Eight hours at time and one-half.

Question. (d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11 p.m. and being relieved at 7 a.m., and consequently in the 24-hour period works nine hours, but not more than eight hours on a shift?

Answer. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

21

ARTICLE 4.

ASSIGNMENTS.

Enginemen, Firemen and Yardmen shall be assigned for a fixed period of time, which shall be for the same hours daily for all members of a crew. So far as it is practicable, assignments shall be restricted to eight hours' work.

Enginemen assigned to regular yard work will be assigned to regular engines if practicable.

ARTICLE 5.

STARTING TIME.

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a.m. and 8 a.m.; the second 2.30 p.m. and 4.00 p.m.; and the third 10.30 p.m. and 12.00 midnight.

(c) Where two shifts are worked in continuous service, the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a.m., and 10.00 a.m., and the second not later than 10.30 p.m.

(e) Where an independent assignment is worked regularly, the starting time will be during one of the periods provided in Sections (b) or (d).

ARTICLE 6.

Calculating Assignment and Meal Periods.

The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

ARTICLE 7.

Lunch Time.

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

ARTICLE 8.

Seniority.

(a) Ability, fitness and seniority entitle Enginemen, Firemen and Yardmen to promotion as opportunity may offer. Enginemen, Firemen and Yardmen passed around for promotion, will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) The order of promotion for Yardmen will be from senior extra Brakeman to regular Brakeman; senior regular promoted Brakeman to extra Conductor; senior extra Conductor to regular Conductor. Failure to make application for a promotion or the refusal of promotion by Yardmen holding seniority rights to entitle them to such promotion, places them behind the last regular Yardman holding a regular assignment. Yardmen desiring to be demoted of their own accord will return to the foot of the extra Brakemen's list, unless incapacitated by sickness or injury, request to be made in writing.

(c) Firemen and Yardmen eligible to promotion to Enginemen and Conductors will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselvs for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen or Yardmen, who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the youngest extra Firemen and can only come up again in his turn, the Yardmen so doing will be placed behind the last Yardman holding a regular assignment. This shall not be retroactive. Firemen and Yardmen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(d) Enginemen, Firemen and Yardmen transferred from the P. B. & W. R. R., the B. & O. R. R. and the Southern Railway to the Washington Terminal Railroad will be given seniority as shown on the official roster of Enginemen dated February 1, 1912; Firemen dated May 1, 1911; and Yardmen dated April 1, 1911.

(e) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen, Firemen and Yardmen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(f) When additional Conductors are needed, a list of the senior eligible Brakemen will be posted ten days prior to the examination.

(g) The senior promoted Brakeman on crews will be eligible to take charge of crews, when the regular Conductor is absent.

(h) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen, Firemen and Yardmen shall govern. Enginemen, Firemen and Yardmen relieved from service through reduction in force, will be given preference in re-employment.

(i) Yardmen absent without leave, will at the expiration of thirty days, be considered as having left the service unless application is made to the proper officer within that period.

(k) Enginemen, Firemen and Yardmen discharged from service will lose their seniority unless reinstated within six months from date of discharge; Enginemen, Firemen and Yardmen leaving the service of their own accord, lose their seniority.

(l) All extra Enginemen, Firemen and Yardmen will be worked first in, first out. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior demoted Engineman on each trick should be used to fill vacancies on that trick after the above five assigned extra Enginemen are used.

(m) Switchtenders will have no seniority as Conductors or Brakemen; Conductors and Brakemen will have no seniority as Switchtenders.

23

(n) Enginemen, Firemen and Yardmen may be given ninety days furlough and at the expiration of that time may, upon making application to the proper officer, resume employment without the loss of seniority.

ARTICLE 9.

Advertising.

(a) New runs, permanent vacancies and the working hours of any run permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman, Fireman or Yardman in the service making application in writing. Enginemen, Firemen or Yardmen making application for a new run or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days and at the expiration of that time will be given to the senior Engineman, Fireman or Yardman in service making application therefor. Temporary vacancies created by the advertisement as above, will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner, and so on until all vacancies are filled.

(c) Firemen failing to make application in writing for a new run or vacancy precludes promotion to that run or vacancy. A Fireman can not make application for a run that he has just vacated, but if the run is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given runs to which their seniority as Firemen entitle them.

(d) When working hours of any run are changed causing the run to be advertised, the Engineman, Fireman or Yardman holding the run prior to the advertisement will be permitted to hold run during the same. When Enginemen, Firemen or Yardmen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

ARTICLE 10.

Discipline.

(a) Enginemen, Firemen and Yardmen will not be discharged or suspended without a just and sufficient cause; neither will they be suspended for minor offenses pending investigation. In case an Engineman, Fireman or Yardman is taken out of service for other than a minor offense, he will be given a hearing and a decision rendered within five days. If found guilty and a verdict of suspension is rendered, it shall be for a given length of time and the employe so notified in writing. The suspension will begin from the time first relieved from duty. If found not guilty of charges, Enginemen, Firemen and Yardmen shall be reinstated and paid for all time lost.

(b) When an Engineman, Fireman or Yardman is brought to trial for an offense, the charge shall be specific. He shall have the right to be accompanied by the Chairman of his respective committee or other employee of his choice and to be represented by the same party accompanying him. He shall also have the right to produce witnesses in his own defense at such examinations or investigations and to examine all papers relative to his case. Witnesses will be examined separately, but in the event of conflicting testimony, those whose evidence conflicts, will be examined together. Enginemen, Firemen and Yardmen shall be given five days' notice prior to date of suspension. In case of appeal, the duly constituted Committees will, upon request, be furnished a transcript of all proceedings of the case.

(c) Enginemen, Firemen and Yardmen not at fault and required by the Railroad to be present at investigations as witnesses will be paid for all time lost at their regular rates upon the minute basis. Enginemen, Firemen and Yardmen who are required to report for investigations after having finished their assignments, shall be given an audience promptly after being relieved. They will be allowed compensation for all time held from the time relieved from duty until relieved from the investigation.

(d) Enginemen, Firemen and Yardmen attending court or inquests under instructions from the Railroad, will be allowed compensation for the same with a minimum of one day; if court or inquest is held away from their home, they will be allowed traveling expenses and board in addition.

(e) If an Engineman, Fireman or Yardman should consider that an injustice has been done him, he may appeal to the Superintendent within ten days in writing. Any Engineman, Fireman or Hostler, who considers that an injustice has been done him, and having appealed his case in writing to the Superintendent, and after the Superintendent has acted upon his appeal, may, if he desires, be represented by a committee representing the Firemen, except in case of an Engineman, such committee should consist of promoted men.

ARTICLE 11.

Time.

(a) Time of Enginemen, Firemen and Yardmen will begin when they are required to report for duty and continue until they are relieved from duty. They will report for duty and be relieved from duty at specified points; when not so relieved and while waiting at specified points they will be considered on duty.

(b) Unless previously notified that they will not be needed, regularly assigned Enginemen, Firemen and Yardmen as well as extra Enginemen, Firemen and Yardmen filling extra assignments, reporting for duty or called for duty and not used, and regular and extra Enginemen, Firemen and Yardmen working less than eight hours,

will be paid a minimum of eight hours, provided they do not discontinue work of their own accord or are assigned to other duties.

(c) Enginemen of single crewed and double crewed engines will report for duty at the appointed time and will receive one half hour's pay in addition to the regular day's pay for preparatory work. Firemen of single or double crewed engines will report for duty within such time to reach the appointed place and will be paid to the nearest tenth of an hour with a maximum of thirty minutes in addition to the regular day's pay for reporting in advance of commencing work.

(d) Enginemen and Firemen will not be required to report more than four hours in advance of going on duty, after having been absent.

ARTICLE 12.

Engine Equipment.

(a) All engines working regular or extra in the yard shall be equipped with foot-boards and grab irons on the front and rear. Regularly assigned engines will be furnished with waterproof boxes to the front for the protection of yardmens' clothes and lunches.

(b) A squirt hose will be maintained on all yard engines at all times; water coolers and tin cups will be placed on all engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be placed upon all engines in yard service and substantial arrangements shall be attached to all engines to afford the Engineman and Fireman protection against inclement weather.

(c) Enginemen, Firemen and Yardmen will not be required to work with engines that blow steam to such an extent that the vision of signals is obscured.

ARTICLE 13.

Crew Consists.

Crews shall consist of a Conductor and at least two Brakemen at all times.

ARTICLE 14.

Special Duty and Yardmaster Positions.

(a) Enginemen and Firemen will be considered in connection with special duty pertaining to locomotives.

(b) Yard Conductors and Brakemen are eligible to promotion to the position of Yardmaster and Assistant Yardmaster and will be given preference in filling such positions.

EMPLOYES COVERED BY THIS SCHEDULE.

ARTICLE 15.

Definition and Duties.

(a) The word "Yardman" as herein used applies to Conductors, Brakemen and Switchtenders in yard service of the Washington Terminal Railroad.

(b) An Outside Hostler is a Hostler who handles engines between the passenger station and the enginehouse or yards or on main tracks; and must have at least 18 months' seniority as a Fireman on the official roster for Firemen; an Inside Hostler is a Hostler who handles engines in and about the engine house or within the confines of the engine terminal; the term "Hostlers' Helper" applies to employees used to assist outside hostlers.

ARTICLE 16.

Pilots and Back-up Men.

(a) Back-up Men will be classified as Conductors and paid Conductors' rate.

(b) Enginemen or Firemen used as Pilots will be allowed Enginemen's pay; Yardmen used as Pilots will be allowed Conductors' pay.

ARTICLE 17.

Outside Service.

(a) Yardmen required to attend switches or Enginemen, Firemen or Yardmen required to perform work outside of their regularly assigned duties, will be paid their regular rates except when filling positions that pay a higher rate, when they will receive the higher rate.

(b) In filling positions that can be taken by disqualified or permanently disabled Enginemen, Firemen or Yardmen, preference will be given such employees as are capable of performing the service.

ARTICLE 18.

Coupling Hose, Etc.

(a) Yardmen will not be required to cut steam hose, neither couple or cut off road engines. They may do so in emergencies; Yardmen will not be required to chain up or unchain cars, couple or uncouple hose in yards or on repair tracks, where Carmen are employed.

Note.—Yardmen will, if necessary to avoid delay to a passenger train, couple or uncouple air hose between engine and cars.

(b) Firemen will not be required to cut hose, couple up or cut off engines or throw switches, but they may do so in emergency.

ARTICLE 19.

Restrictions.

(a) Enginemen will not be required to fill or screw down grease cups on yard engines. They must, however, report when this attention is necessary.

(b) Firemen will be relieved of cleaning engines; neither will they be required to clean fires. Lubricators will be filled, markers and other lamps cared for, including filling, but not lighting, and all supplies placed on engines at points where round house or shop forces are maintained. The Firemen shall not, however, be relieved of the responsibility of knowing whether the engines for which they are called, are properly equipped.

ARTICLE 20.

Experienced Men.

In the employment of Yardmen, experienced men will be given preference.

ARTICLE 21.

Service Letter.

Enginemen, Firemen and Yardmen, who have been in the Railroad's service for six months, will, if they so desire, be given a service letter signed by the Superintendent, when leaving the employment of the Railroad, which they must sign when presented. This letter will indicate the different services performed during employment.

ARTICLE 22.

Fines, Lamps, Etc.

(a) No fines shall be imposed upon Enginemen, Firemen or Yardmen.

(b) Yardmen will not be required to purchase globes or lamps.

ARTICLE 23.

Time Not Allowed.

When time claimed is not allowed, Enginemen, Firemen and Yardmen will be notified in writing and the reasons given therefor.

ARTICLE 24.

Rest Periods.

Rest periods will be regulated in accordance with the Federal Statute known as the "Sixteen-Hour Law." Enginemen, Firemen and Yardmen, who are relieved for rest in compliance with this law, shall be allowed to resume work when the lawful rest period is up and to work eight hours or be paid therefor.

DECISIONS OF THE COMMISSION OF EIGHT.

Decision No. 1. Effective 7-1-17

ARTICLE NO. 1.

Hours on Duty.

(a) Eight hours or less shall constitute a day's work. Overtime to be paid pro-rata actual minutes to be counted.

(b) Yard crews will be assigned for a fixed period of time per day, not to exceed ten hours except in isolated yards where only one yard crew is assigned and where the work requires it, the time of the assignment may be extended not to exceed twelve hours; under this exception, the minimum shall be ten hours.

(c) No new work will be given to a crew where the assignment is for 9 or more hours after the expiration of the period for which regularly assigned; overtime may be required in order to finish work that the crew is performing at the expiration of the assigned period or in emergencies. This will not be construed to extend the Company's rights under similar existing rules for 10-hour assignments.

(d) On assignment where the hours are limited to eight, overtime will be worked only in case of emergency; or in case of transfer crews or crews engaged in industrial work to finish assigned or programmed work, or in either case to get to regular relief points; the purpose being that if assigned or programmed service usually requires more than eight hours' work, the assignment should be extended to meet the requirements of the service, either 9 or 10 hours.

(e) Sections (a), (b), (c) and (d) will also apply to yard crews called or used in extra service. They shall not be construed to require railroads to pay yard crews for more than the minimum day plus the actual time consumed in excess of eight hours, except where the assignment is for either nine or ten hours the minimum shall be nine hours exclusive of the meal hour.

Questions and Answers, Supplement "B," for the Purpose of Information.

Question No. 7. Paragraph (c).

What constitutes new work as mentioned in this Article which stipulates that no new work will be given to a crew where the assign-

ment is for 9 or more hours after the expiration of the period to which regularly assigned?

Answer.

New work is such work as is not a portion of the regular programmed or routine work of a crew. If the regular work is made up of distinct portions, and a distinct portion remains to be performed after the hours of the assignment, such distinct portions are not new work. Work which is not a portion of the program or routine may be added to the program or routine prior to the end of the assigned hours, but not afterwards. Overtime may be worked to finish the programmed or routine work of an assignment. This is not to be construed as authority to work crews overtime when it can be avoided; nor is it to be construed as authority to program work when it is clearly known that portions of the programmed work, under ordinary conditions, can not be started until after the assigned period, or to require overtime on new work which is given to a crew prior to end of assigned period.

Question No. 8. Paragraphs (c) and (d).

What is the distinction between assigning "new work" and "overtime" in relation to paragraph (c) Artice 1?

Answer.

There is no difference regarding "new work"; the distinction lies in the fact that on an eight-hour assignment "overtime may" NOT "be required in order to finish work that the crew is performing at the expiration of the assigned period" except as stated: "only in case of emergency," or as further provided for transfer crews or crews engaged in industrial work.

Question No. 10. Paragraph (d).

What constitutes an emergency under this Article which provides that when assignments are limited to eight hours, overtime will be worked only in case of emergency, etc.?

Answer.

It is the intention of this paragraph, as well as paragraph (c) to restrict the hours of work to the assignment, either 8, 9 or more hours, and only such occurrences as can not be foreseen and requiring immediate attention can be considered emergencies.

Question No. 11.

Is it permissible to have regular crew on an assignment for a given number of hours, and have one or more members thereof on an assignment of a less number of hours?

Answer.

No regular member of the crew shall be assigned for a lesser number of hours than the number of hours for the crew as a unit.

ARTICLE NO. 2.

Lunch Time.

(a) Yard crews where the hours of work are limited to eight will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

(e) In eight-hour yard assignments yard crews will not be required to work longer than 6 hours without being allowed 20 minutes, and in 9 or more hour assignments, 30 minutes for lunch, with no deduction in pay or time therefor.

Answer to Question 12.

Where paragraph (d), Article 2, is agreed to in lieu of former dinner-hour rules, which provided for a full hour without pay therefor, no penalty is attached thereto. Paragraph (e), Article 2, is mandatory, in that "yard crews WILL NOT be required to work longer than 6 hours without being allowed" stipulated time "for lunch," as is also the provision pertaining to "4½ and 6 hours," Article 2 paragraphs (a) and (b).

Question 13. Paragraphs (a), (b), (d) and (e).

Under the several provisions for meal periods, must they be given within the prescribed time?

Answer.

Yes. The lunch period must be given and COMPLETED within 4½ and 6 hours.

ARTICLE NO. 3.

(a) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three 8-hour shifts are worked in continuous service the time for the first shift to begin work will be between 6.30 a.m. and 8.00 a.m.; the second 2.30 p.m. and 4.00 p.m.; and the third 10.30 p.m., and 12.00 midnight.

(c) Where two 8-hour shifts are worked in continuous service the first shift may be started during any one of the periods named in paragraph (b).

(d) Where two 8 or 9-hour shifts are worked not in continuous service the time for the first shift to begin work will be between the hours of 6.30 a.m. and 10.00 a.m., and the second not later than 10.00 p.m.

ARTICLE NO. 4.

CALCULATING ASSIGNMENTS AND MEAL PERIODS.

The time for fixing the beginning of assignments or meal period is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

RULES OF CHICAGO JOINT AGREEMENT.

The following rules of the Chicago Joint Agreement are adopted effective September 1, 1919, and are written into the schedules of Regulations for the government of Yard Enginemen and Firemen and supersede conflicting regulations for the government of Yard Enginemen and Firemen employed on the Washington Terminal Railroad effective January 1, 1919, by order of Director General.

Representation Rule:

The right of any Engineer, Fireman or Hostler to have the regularly constituted Committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the General Committee making the same, is conceded; provided, when a member of either organization has a grievance, which the local Committee of his organization is unable to adjust with the local officers of the Company, the matter shall be handled by the two General Chairmen, who shall work jointly in handling such grievance to its final conclusion.

ARTICLE 10.

(a) Firemen shall rank on the Firemen's roster from the date of their first service as Firemen when called for such service, except as provided in Section (k), and, when qualified, shall be promoted to positions as Engineers in accordance with the following rules:

(b) Firemen shall be examined for promotion according to seniority on the Firemen's roster, and those passing the required examination shall be given certificate of qualification, and, when promoted, shall hold their same relative standing in the service to which assigned.

(c) If for any reason the senior eligible Fireman or Engineer to be hired is not available, and the junior qualified Fireman is promoted

and used in actual service out of his turn, whatever standing the junior Fireman so used establishes, shall go to the credit of the senior eligible Fireman or Engineer to be hired, provided the Engineer to be hired is available and qualifies within thirty days. As soon as the senior Fireman or Engineer to be hired is available, as provided herein, he shall displace the junior Fireman, who shall drop back into whatever place he would have held had the senior Fireman to be promoted or Engineer to be hired been available and the junior Fireman not used.

Note: Qualification, as referred to herein, is not intended to include learning of road or signals.

(d) As soon as a Fireman is promoted, he will be notified in writing by the proper official of the Company of the date of his promotion, and unless he files a written protest within sixty days against such date, he can not thereafter have it changed. When a date of promotion has been established in accordance with regulations, such date shall be posted, and if not challenged in writing within sixty days after such posting, no protest against such date shall afterwards be heard.

(e) No Fireman shall be deprived of his rights to examination, nor to promotion in accordance with his relative standing on the Fireman's roster because of any failure to take his examination by reason of the requirements of the Company's service, by sickness, or by other proper leave of absence; provided, that upon his return he shall be immediately called and required to take examination and accept proper assignment.

(f) The posting of notice of seniority rank, as per Section (d) shall be done within ten days following date of promotion, and such notice shall be posted on every bulletin board of the seniority district on which the man holds rank.

(g) Firemen having successfully passed qualifying examination shall be eligible as Engineers. Promotion and the establishment of a date of seniority as Engineer, as provided herein, shall date from the first service as Engineer when called for such service, provided there are no demoted Engineers back firing. No demoted Engineer will be permitted to hold a run as Fireman on any seniority district while a junior Engineer is working on the Engineers' extra list, or holding a regular assignment as Engineer on such seniority district.

Note: On roads where promotion is to road service only, promotion and establishment of seniority date as road Engineer will obtain.

(h) On a seniority district where Firemen are required to fire less than three years, all Engineers will be hired:

If required to fire three and less than four years, one promoted and one hired:

If required to fire four and less than five years, two promoted and one hired:

If required to fire five and less than six years, three promoted to one hired:

If required to fire six and less than seven years, four promoted to one hired:

If required to fire seven and less than eight years, five promoted to one hired:

On seniority districts where Firemen are required to fire eight years or more, all Engineers will be promoted.

The foregoing will not prevent Committees from having discharged Engineers re-employed or reinstated on their former seniority districts at any time.

(i) If the Engineer to be hired is not available, when needed, and the senior qualified Fireman is promoted, the date of seniority thus established shall fix the standing of the hired Engineer, who, if available and qualified within thirty days from date senior qualified Fireman is promoted, will rank immediately ahead of the promoted Fire-

man. The promoted Fireman will retain his date of seniority as Engineer and will be counted in proportion of promotions.

(j) In case an Engineer is hired and used in actual service, when, under requirements of Section (h), a Fireman (or Firemen) should have been promoted, the date of seniority thus established shall fix the standing of the senior qualified Fireman (or Firemen) due to be promoted, provided he or they are eligible and qualify within thirty days, who shall rank immediately ahead of the hired Engineer on the Engineers' seniority list. The hired Engineer will retain his date of seniority, and be counted in proportion of Engineers to be hired.

(k) The seniority date of the hired Engineer shall be the date of his first service as Engineer, except as provided in Sections (c), (i) and (j) of this Article. It is further provided that Engineers hired, or permanently transferred from one seniority district to another on any railroad, shall be given a date of seniority as Fireman corresponding with their date as Engineer.

ARTICLE 11.

31

(a) When, from any cause, it becomes necessary to reduce the number of Engineers on the Engineers' working lists on any seniority district, those taken off may, if they so elect, displace any Fireman their junior on that seniority district under the following conditions:

1st.—That no reduction will be made so long as those in assigned or extra passenger service are earning the equivalent of 4,000 miles per month; in assigned, pooled or chain-gang freight, or other service paying freight rates, are averaging the equivalent of 3,200 miles per month; on the road extra list are averaging the equivalent of 2,600 miles per month, or those on the extra list in switching service are averaging 26 days per month.

2d.—That when reductions are made they shall be in reverse order of seniority.

(b) When hired Engineers are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty days from the date their services are required. This rule also applies to Firemen.

(c) Engineers taken off under this rule shall be returned to service as Engineers in the order of their seniority as Engineers, and as soon as it can be shown that Engineers in assigned or extra passenger service can earn the equivalent of 4,800 miles per month; in assigned—pooled—chain-gang or other regular service paying freight rates—the equivalent of 3,800 miles per month—or in extra service the equivalent of 3,000 miles per month.

(d) In the regulation of passenger or other assigned service, sufficient men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles for passenger service, and 3,200 and 3,800 miles for other regular service, as provided herein. If, in any service, additional assignments would reduce earnings below these limits, regulations will be effected by requiring the regular assigned man or men to lay off when the equivalent of 4,800 miles in passenger or 3,800 miles in other regular service has been reached.

(e) Under this rule, it is understood that after all Engineers who have been taken off have been returned to service as Engineers, this rule shall not apply with respect to further additions.

Note: In making reductions and replacing Firemen upon the service list, the same mileage shall apply as in the case of Engineers.

ARTICLE 25.

Duration of Schedule.

This Schedule will not be changed, abrogated or annulled by either party to it, without giving thirty days advance written notice to the other party, setting forth intentions or desires to effect the same.

(Signed)

For the Washington Terminal Railroad,
J. L. Wilkes,
Superintendent.

For the Brotherhood of Locomotive Engineers,
Darius Harman,
General Chairman.

For the Brotherhood of Locomotive Firemen and Enginemen,
H. B. Bowersox,
General Chairman.

For the Brotherhood of Railroad Trainmen,
Wm. Abbott,
General Chairman.

Approved:
J. B. Warrington,
Terminal Manager.

EXHIBIT D.

THE WASHINGTON TERMINAL COMPANY

SCHEDULE OF RULES AND RATES OF PAY FOR ENGINEMEN AND FIREMEN

(In the Operation of Trains or Engines Propelled by Steam or Other Motive Power)

Effective February 1, 1923

(except as otherwise specified)

ARTICLE 1.

Rates of Pay.

Enginemen (Effective August 1, 1927.)

Weight on Drivers	Rate per Day	Hourly Rate Regular	Hourly Rate Overtime
Less than 140,000 pounds	$7.22	$ .9025	$1.355
140,000 to 200,000 pounds	7.40	.925	1.3875
200,000 to 300,000 pounds	7.57	.9475	1.4225
300,000 pounds and over	7.74	.9675	1.4525
Mallets under 275,000 pounds	8.39	1.05	1.575
Mallets 275,000 pounds and over	8.64	1.08	1.62

Firemen and Helpers (Electric) (Effective February 1, 1927)

	Firemen			Helpers (Electric)		
Weight on Drivers	Rate per day	Hourly Regular	Rate Overtime	Rate per day	Hourly Regular	Rate Overtime
Less than 140,000 pounds ..	$5.68	$.71	$1.065	$5.68	$.71	$1.065
140,000 to 200,000 pounds ..	5.81	.7275	1.09	5.68	.71	1.065
200,000 to 300,000 pounds ..	5.93	.7425	1.1125	5.68	.71	1.065
300,000 pounds and over ...	6.11	.765	1.1475	5.85	.7325	1.0975
Mallets:						
Under 275,000 pounds	6.88	.86	1.29			
275,000 pounds and over ...	7.14	.8925	1.34			

HOSTLERS (Effective February 1, 1927)

	Rate per Day	Hourly Rate Regular	Overtime
Outside	$6.36	$.795	$1.1925
Inside	5.68	.71	1.065
Hostler Helpers	5.07	.635	.9525

ARTICLE 2.

BASIC DAY.

Eight hours or less shall constitute a day's work.

ARTICLE 3.

OVERTIME.

Except when changing off, where it is the practice to work alternately days and nights for certain periods; working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required to be used by schedule rules—any rules to the contrary to be changed accordingly—all time worked in excess of eight hours continuous service in a twenty-four hour period shall be paid for as overtime on the minute basis at one and one-half times the hourly rate. Extra Enginemen and Firemen will not be paid time and one-half unless service is continuous.

Example.

What compensation should be allowed for additional service where a crew is regularly assigned to work 12.00 midnight to 8.00 a. m. and (service performed not affected by exceptions outlined in this rule):

Question. (a) Is required to cover the third shift on the same day 4.00 p. m. to 12.00 midnight?

Answer. (a) Eight hours at time and one-half.

Question. (b) Is required in an emergency to work 8.30 a. m. until 11.30 a. m.?

Answer. (b) Eight hours at time and one-half.

Question. (c) Is required in an emergency to work 8.00 p. m. to 12.00 midnight (four hours) on the same day?

Answer. (c) Eight hours at time and one-half.

Question. (d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11.00 p. m. and being relieved at 7.00 a. m., and consequently in the 24-hour period worked nine hours, but not more than eight hours on a shift?

Answer. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

ARTICLE 4.

ASSIGNMENTS.

Enginemen and Firemen shall be assigned for a fixed period of time. So far as it is practicable, assignments shall be restricted to eight hours' work.

Enginemen assigned to regular yard work will be assigned to regular engines if practicable.

ARTICLE 5.

STARTING TIME.

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a. m. and 8.00 a. m.; the second, 2.30 p. m. and 4.00 p. m.; and the third, 10.30 p. m. and 12.00 midnight.

(c) Where two shifts are worked in continuous service, the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a. m. and 10.00 a. m., and the second not later than 10.30 p. m.

(e) Where an independent assignment is worked regularly, the starting time will be during one of the periods provided in Sections (b) or (d).

ARTICLE 6.

Calculating Assignment and Meal Periods.

The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

35

ARTICLE 7.

Lunch Time.

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(c) An individual engineman, fireman or hostler working through two shifts is to have one meal period with each. (Effective March 16, 1924.)

ARTICLE 8.

Seniority.

(a) Ability, fitness, and seniority entitle Enginemen and Firemen to promotion as opportunity may offer. Enginemen and Firemen passed around for promotion will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) Firemen eligible to promotion to Enginemen will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the senior extra Firemen and can only come up again in his turn. This shall not be retroactive. Firemen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(c) Enginemen and Firemen transferred from the P. B. & W. R. R. and the B. & O. R. R. to the Washington Terminal Company will be given seniority as shown on the official roster of Enginemen dated February 1, 1912, and Firemen dated May 1, 1911.

(d) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen and Firemen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(e) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen and Firemen shall govern. Enginemen and Firemen relieved from service through reduction in force, will be given preference in re-employment without loss of seniority providing they return to service within 30 days from time required. (Effective October 25, 1927.)

(f) Enginemen and firemen dismissed from service will lose their seniority unless reinstated within six months from date of dismissal; Enginemen and Firemen leaving the service of their own accord lose their seniority.

(g) All extra Enginemen and Firemen will be worked first in first out, but they will be marked up on the list in the manner in which they came off unless overtime is made. In emergencies, Extra Enginemen and Firemen may be used out of turn provided they are placed back on the board in such a manner as to avoid the loss or gain of a turn to any extra man on extra list. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior promoted Fireman on each trick should be used to fill vacancies on that trick after the above five assigned extra Enginemen are used.

(h) When the requirements of the service will permit, enginemen, firemen and hostlers, on request, may be granted leave of absence for a limited time with privilege of renewal. An employee absent on leave, who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company. (Effective March 16, 1924.)

ARTICLE 9.

Advertising.

(a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman or Fireman in the service making application in writing. Enginemen or Firemen making application for a new assignment or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days, and at the expiration of that time will be given to the senior Engineman or Fireman in service making application therefor. Temporary vacancies created by the advertisement as above will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner and so on until all vacancies are filled.

(c) Enginemen or Firemen failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. An Engineman or Fireman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given assignments to which their seniority as Firemen entitle them.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Engineman or Fireman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Enginemen or Firemen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

(e) When two or more engines of different weight are used during the tour of duty in any class of service the highest rate applicable to any engine used shall be paid for the entire trick of duty. (Effective October 25, 1927.)

ARTICLE 10

Discipline.

(a) Enginemen, firemen and hostlers will not be suspended or dismissed from the service without a fair and impartial trial; neither will they be held off duty for minor offenses pending investigation or decision. If found not guilty of charges, enginemen, firemen and hostlers shall be reinstated and paid for all time lost. Witnesses will be examined separately, but in the event of conflicting testimony, those whose evidence conflicts will be examined together. Enginemen, firemen and hostlers will be notified in writing five days prior to date suspension takes effect. (Effective March 16, 1924.)

(b) Time lost attending investigations will be applied against suspension and notice of discipline will be worded accordingly. Time lost as a result of appeals from discipline will not be applied against suspension.

(c) An Engineman, Fireman or Hostler required to attend investigation may be accompanied by an employee of his own selection, who will be permitted to question witnesses so far as the interest of the Engineman, Fireman or Hostler is concerned.

(d) When letters of suspension or censure are given Enginemen, Firemen and Hostlers, they will be permitted to retain same.

(e) Enginemen, Firemen and Hostlers attending court or inquest under instructions from the Railroad, will be allowed compensation for the same with a minimum of one day; if court or inquest is held away from their home, they will be allowed traveling expenses and board in addition.

(f) An Engineman, Fireman or Hostler who considers that an injustice has been done him, and who has appealed his case in writing to the Superintendent within five days, will be given a hearing at which he may be accompanied by an employee of either of the above classes to assist him in presenting his case. (Effective October 25, 1927.)

(g) An Engineman, Fireman or Hostler may have the regularly constituted committee of his organization represent him in the handling of his grievances, under the interpretation placed upon the schedule involved; provided, when a member of either organization has a grievance, which the local committee of his organization is unable to adjust, the matter may be further handled by the two general chairmen working jointly.

ARTICLE 11.

Time.

(a) Time of Enginemen and Firemen will begin when they are required to report for duty and continue until they are relieved from duty. They will report for duty and be relieved from duty at specified points; when not so relieved and while waiting at specified points they will be considered on duty.

(b) Extra Enginemen or Firemen called and released without performing service will be paid one-half of a minimum day and stand first out; if held over four hours they will be paid a minimum day and will be placed at the foot of the board.

(c) Enginemen and Firemen required, for the purpose of preparing engine, to report in advance of time fixed for crew to begin work as a unit, will receive actual time with not less than thirty minutes at regular hourly rate, according to weight of engine on drivers, in addition to regular day's pay. Enginemen when arriving on Inspection Pit after completion of assignment will be allowed ten minutes pro-rata pay for inspecting engine and making our report.

(d) Enginemen and Firemen will not be required to report more than four hours in advance of going on duty, after having been absent.

(e) Enginemen, Firemen and Hostlers required to attend investi-

gations will be given an audience promptly and when not at fault will be paid at regular rates on a minute basis for time held after relieved from duty.

(f) Firemen performing more than one class of service in a tour of duty, will be paid for the entire service at the highest rate applicable to any class of service performed, with a minimum of one day for the combined service. The overtime basis for the rate paid will apply for the entire tour of duty. (Effective May 1, 1923.)

ARTICLE 12.

Engine Equipment.

(a) A squirt hose will be maintained on all yard engines at all times; water coolers will be placed on all engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be placed upon all engines in yard service and substantial arrangements shall be attached to all engines to afford the Engineman and Fireman protection against inclement weather.

(b) Enginemen and Firemen will not be required to work with engines that blow steam to such an extent that the vision of signals is obscured.

ARTICLE 13.

Special Duty.

Enginemen and Firemen will be considered in connection with special duty pertaining to locomotives.

EMPLOYEES COVERED BY THIS SCHEDULE.

ARTICLE 14.

Definition and Duties.

An Outside Hostler is a Hostler who handles engines between the passenger station and the engine-house or yards or on main tracks; and should have at least 18 months' seniority as a Fireman on the official roster for Firemen; an Inside Hostler is a Hostler who handles engines in and about the enginehouse within the confines of the engine terminal; the term "Hostlers' Helper" applies to employees used to assist outside Hostlers.

ARTICLE 15.

Pilots.

Enginemen or Firemen used as Pilots will be allowed Enginemen's pay.

ARTICLE 16.

Outside Service.

(a) Enginemen, Firemen or Hostlers required to perform work outside of their regularly assigned duties, will be paid their regular rates except when filling positions that pay a higher rate, when they will receive the higher rate.

(b) In filling positions that can be taken by disqualified or permanently disabled Enginemen or Firemen, consideration will be given to such employees as are capable of performing the service.

ARTICLE 17.

Coupling Hose, Etc.

Firemen will not be required to cut hose, couple up or cut off engines or throw switches but they will do so in emergency.

ARTICLE 18.

Restrictions.

(a) Grease cups will be filled and screwed down when engines are put out for service. Enginemen will give any necessary attention while engines are in their charge and report any attention so given.

(b) Firemen will be relieved of cleaning engines; neither will they be required to clean fires. Lubricators will be filled, markers and other lamps cared for, including filling, but not lighting, and all supplies placed on engines at points where roundhouse or shop forces are maintained. The Firemen shall not, however, be relieved of the responsibility of knowing whether the engines for which they are called, are properly equipped.

ARTICLE 19.

Service Letter.

Enginemen and Firemen who have been in the Company's service for six months, will, if they so desire, be given a service letter signed by the Superintendent, when leaving the employment of the Company, which they must sign when presented. This letter will indicate the different services performed during employment.

ARTICLE 20.

Time Not Allowed.

When time claimed is not allowed, Enginemen and Firemen will be notified in writing and the reasons given therefor.

ARTICLE 21.

Rest Periods.

Rest period will be regulated in accordance with the Federal Statute known as the "Sixteen Hour Law." Enginemen and Firemen who are relieved for rest in compliance with this law, shall be allowed to resume work when the lawful rest period is up and to work eight hours or be paid therefor.

ARTICLE 22.

Duration of Schedule.

Should either the Management or the Enginemen and Firemen desire to change any or all these regulations, the party desiring to make the change shall notify the other party in writing of the desired change; and no change will be made, except by mutual consent, until thirty days after such notice has been given.

FOR THE WASHINGTON TERMINAL COMPANY:

J. H. Tonge,
Superintendent.

FOR THE EMPLOYEES:

Darius Harman,
General Chairman.
Brotherhood of Locomotive Engineers.

Paul B. Cornwell,
General Chairman.
Brotherhood of Locomotive Firemen & Enginemen.

EXHIBIT E.

CIRCULAR NO. 1

(ISSUED OCTOBER 10, 1934)

NATIONAL RAILROAD ADJUSTMENT BOARD

ORGANIZATION AND CERTAIN RULES OF PROCEDURE

Headquarters, Chicago, Illinois

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

ORGANIZATION

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of ten Members, and the Fourth Division thereof is composed of six Members.

CLASSES OF DISPUTES

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act approved June 21, 1934.

Jurisdiction

First Division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions.

Form of Submission

Parties: All parties to the dispute must be stated in each submission.

Statement of Claim: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired.

Statement of Facts: In a "Joint Statement of Facts," if possible, briefly, but fully set forth the controlling facts involved. In event of inability to agree upon a "Joint Statement of Facts," then each party shall show separately the facts as they respectively believe them to be.

Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

Position of Carrier: Under this caption the carrier must properly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

Signatures: All submissions must be signed by the parties submitting the same.

Ex Parte Submission: In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

GENERAL

To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

HEARINGS

Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

APPEARANCES

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

AWARDS

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

"NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of ..... Division

ATTEST: .....
Secretary."

By order of

NATIONAL RAILROAD ADJUSTMENT BOARD,

MACY NICHOLSON, *Chairman,*
D. W. HELT, *Vice-Chairman.*

RESOLUTION ADOPTED JUNE 18, 1935*

"It is agreed by the members of the First Division that in handling of Ex Parte submissions, from this date, *June 18, 1935, until January 1, 1936,* the following method will be adopted as a matter of trial and without change in the present rule of handling of Ex Parte submissions, except as follows:

When the submissions of both parties to this dispute have been received by the Secretary of the First Division, he will immediately furnish each of the parties to the dispute with the submission of the other party, in order that they may be properly prepared to answer all phases of the dispute when hearing is held.

This arrangement to be used for the guidance of the First Division and to remain in that body and *cease on January 1, 1936,* unless extended by the majority vote of the First Division."

QUOTATION FROM THE MINUTES OF APRIL 27, 1937, SHOWING FURTHER ACTION TAKEN THEREON*

"Resolved that the resolution adopted on June 18, 1935, with respect to ex parte submissions regarding the mailing of the employees' submission to the management, and of the management's submission to the committees, be and the same is hereby continued in effect until July 1, 1938, on which date the arrangement terminates unless extended by a majority vote of the full membership of the First Division; and that the secretary of the Division incorporate in each such letter of transmittal the following specific language:

'This case is assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

At the direction of the Division I am sending to the management a copy of the employees' submission, and to the general chairman a copy of the management's submission. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.' "

* The above rules have been continued in effect by the First Division of the National Railroad Adjustment Board and are still effective.

EXHIBIT F.

Award No. 3115
Docket No. 5059

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

The First Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

Parties to Dispute:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

BROTHERHOOD OF RAILROAD TRAINMEN

THE WASHINGTON TERMINAL COMPANY

STATEMENT OF CLAIM: It is the practice of the Washington Terminal Company to require tenant line road engines, manned by tenant line road engine crews, to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot, and perform other switching service on tracks of the Washington Terminal. Road engine crews of the Southern Railway, the Chesapeake & Ohio, and the Richmond, Fredericksburg & Potomac, all tenant lines, have been required to remain on their engines and turn their trains before delivering to the coach yards. Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company.

EMPLOYES' STATEMENT OF FACTS: February 3rd, 1903, an Act of Congress was approved to provide for a Union Railroad Station in the District of Columbia. Certain portions of this legislation refer to an Act of Congress approved February 12th, 1901, entitled, "An Act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore & Ohio Railroad Company in the City of Washington, and for other purposes." Section 3 of the Act of 1903 provides that the said Terminal Company is also expressly authorized and empowered, subject to the approval of the Commissioners of the District of Columbia, to acquire and become possessed of such lands in the District of Columbia, outside the City limits, as may be from time to time needed for the purpose, and thereon to construct, maintain, own, and operate yard tracks, switches, roundhouses, shops, and other structures to adequately accomodate the handling, shifting, housing, storing, cleaning, and repairing of the locomotives and cars of such companies as shall be entitled to use the said passenger station and terminal; and also to establish, maintain and operate the necessary tracks connecting the same with the tracks on Delaware Avenue; provided, that said roundhouses and shops shall be located as designated on plans to be approved by the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner.

As a result of this legislation, the Baltimore & Ohio and the Pennsylvania Railroad instituted plans for the building of a Union Passenger Station in the City of Washington. Upon the opening of the Washington Terminal Company in 1907, the employes necessary for all branches of its operation were taken from the Baltimore & Ohio Railroad, the Pennsylvania Railroad and the Southern Railway, retaining their seniority rights with their respective railroads.

On February 10th, 1908, Superintendent G. W. Martin of the Washington Terminal Company issued General Notice No. 27, reading as follows:

"In order that permanent switching crews may be organized, it is desired that all conductors, brakemen, enginemen and firemen, who were transferred from the P. B. & W. Railroad, B. & O. Railroad and Southern Railway, and are now in the service of the Terminal Company, signify their intention of remaining with the Terminal Company. The seniority rating held with their respective companies prior to the transfer will hold with the Terminal Company.

"Those desiring to remain will forward applications to this office by or before February 20th.

"It is expected that the requirements will be twelve day crews and eleven night crews.

"The Terminal is perfecting plans for a relief department, which, if adopted, will include the various features that now prevail in the relief departments of the P. B & W. Railroad and B. & O. Railroad, and transferred employees will bring with them such credits as they may now hold with their respective companies. However, until this department is organized, the men who have been transferred and who are members, will be cared for by the relief departments of their respective companies the same as heretofore."

45

On or before the date set those who wished to remain as employes of the Washington Terminal Company signified their desire to do so and relinquished the rights they held on the railroad from which they transferred, and negotiated agreements with the management of the Washington Terminal Company, which have remained in effect, except as revised from time to time by agreement between the Management and the Employes.

The limits of the Washington Terminal as described on Page 4 of the book of rules of that company are as follows:

"Washington Terminal—Comprises Union Station, the tracks from Union Station extending northward to Division Boards located at junction with P. R. R. and Washington Branch of B. & O. R. R., 467 feet north of center line of New York Avenue overhead bridge; at junction with Metropolitan Branch of B. & O. R. R., 395 feet north of center line of New York Avenue overhead bridge, southward to the Division Board located at junction with P. R. R., 1,584 feet south of South Portal of First Street Tunnel; Eckington Coach Yard; and Ivy City Engine and Shop Yard."

Article 8 of the current Schedule of Rules and Rates of Pay for Conductors, Brakemen, Back-Up Men, Pilots and Switchtenders reads as follows:

"Seniority. (a) Ability, fitness and seniority entitle Yardmen to promotion as opportunity may offer. Yardmen passed around for promotion, will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) The order of promotion for Yardmen will be from senior extra Brakeman; senior regular promoted Brakeman to exta Conductor; senior extra Conductor to regular Conductor. Failure to make application for a promotion or the refusal of promotion by Yardmen holding seniority rights to entitle them to such promotion, places them behind

the last regular Yardman holding a regular assignment. Yardmen desiring to be demoted of their own accord will return to the foot of the extra Brakeman's list, unless incapacitated by sickness or injury, request to be made in writing.

(c) Yardmen eligible to promotion to Conductors will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination, and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Yardmen, who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Yardmen so doing will be placed behind the last Yardman holding a regular assignment. This shall not be retroactive. Yardmen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(d) Yardmen transferred from the P. B. & W. R. R., the B. of O. R. R., and the Southern Railway to the Washington Terminal Company will be given seniority as shown on the official roster of Yardmen dated April 1, 1911.

(e) A classified roster will be posted adjacent to the Crew Board, giving dates Yardmen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(f) When additional Conductors are needed, a list of the senior eligible Brakemen will be posted ten days prior to the examination.

(g) The senior promoted Brakeman on crews will be eligible to take charge of crews, when the regular Conductor is absent.

(h) In reduction of force and rearrangement of crews consequent thereto, seniority of Yardmen shall govern. Yardmen relieved from service through reduction in force, will be given preference in reemployment without loss of seniority providing they return to service within 30 days from time required. (Effective May 1, 1928.)

(i) Yardmen absent without leave, will at the expiration of five days, be considered as having left the service unless application is made to the proper officer within that period.

(k) Yardmen dismissed from service will lose their seniority unless reinstated within six months from date of discharge; Yardmen leaving the service of their own accord, lose their seniority.

(l) All extra Yardmen will be worked first in, first out.

(m) Switchtender will have no seniority as Conductors or Brakemen; Conductors and Brakemen will have no seniority as Switchtenders.

(n) When the requirements of the service will permit, employes, on request, may be granted leave of absence for a limited time with privilege of renewal. An employee absent on leave, who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company."

Article 9 of the same schedule reads as follows:

"Advertising. (a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Yardman in the service making application in writing. Yardmen making application for a new assignment or vacancy must file the same with the officer signing the advertisement and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the ex-

piration of five days, be advertised upon the Bulletin Board for a period of three days and at the expiration of that time will be given to the senior Yardman in service making application therefor. Temporary vacancies created by the advertisement as above, will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner, and so on until all vacancies are filled.

(c) Yardmen failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. A Yardman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Yardman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Yardmen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work."

Articles 8 and 9 of the current Schedule of Rules and Rates of Pay for Enginemen and Firemen, read as follows:

47

"ARTICLE 8.

"Seniority. (a) Ability, fitness and seniority entitle Enginemen and Firemen to promotion as opportunity may offer. Enginemen and Firemen passed around for promotion will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) Firemen eligible to promotion to Enginemen will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the senior extra Firemen and can only come up again in his turn. This shall not be retroactive. Firemen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(c) Enginemen and Firemen transferred from the P. B. & W. R. R., and the B. & O. R. R. to the Washington Terminal Company will be given seniority as shown on the official roster of Enginemen dated February 1, 1912, and Firemen dated May 1, 1911.

(d) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen and Firemen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(e) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen and Firemen shall govern. Enginemen and Firemen relieved from service through reduction in force, will be given preference in re-employment without loss of seniority provided they return to service within 30 days from time required. (Effective Oct. 25, 1927.)

(f) Enginemen and Firemen dismissed from service will lose their seniority unless reinstated within six months from date of dismissal; Enginemen and Firemen leaving the service of their own accord lose their seniority.

(g) All extra Enginemen and Firemen will be worked first in, first out, but they will be marked upon the list in the manner in which

they came off unless overtime is made. In emergencies, extra Enginemen and Firemen may be used out of turn provided they are placed back on the board in such a manner as to avoid the loss or gain of a turn to any extra man on extra list. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior promoted Firemen on each trick should be used to fill vacancies on that trick after the above five assigned extra Enginemen are used.

(h) When the requirements of the service will permit, enginemen, firemen and hostlers, on request, may be granted leave of absence for a limited time with privilege of renewal. An employe absent on leave who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company. (Effective March 16, 1924.)

"ARTICLE 9.

"Advertising. (a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman or Fireman in the service making application in writing. Enginemen or Firemen making application for a new assignment or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days, and at the expiration of that time will be given to the senior Enginemen or Fireman in service making application therefor. Temporary vacancies created by the advertisement as above will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner and so on until all vacancies are filled.

(c) Enginemen or Fireman failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. An Engineman or Fireman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given assignments to which their seniority as Firemen entitles them.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Engineman or Fireman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Enginemen or Fireman are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

(e) When two or more engines of different weight are used during the tour of duty in any class of service the highest rate applicable to any engine used shall be paid for the entire trick of duty. (Effective October 25, 1927.)"

This complaint as set forth under "Statement of Claim" has been in existence practically ever since the Washington Terminal was opened and repeated conferences have been held with the Management of the Washington Terminal Company by the committees, assisted by officers of their respective organizations, without being successful in satisfactorily disposing of the case. The last of these conferences was held with Mr. C. W. Galloway, Chairman, Board of Managers, Washington Terminal Company, on May 15th, 1937.

POSITION OF EMPLOYES: It is the contention of the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen that the contracts or agreements existing between the Washington Terminal Company and the organizations guarantee the employes covered by such agreements the right to perform the work in dispute, and that tenant line companies because of these agreements on the Washington Terminal have no right to make agreements with their respective employes to perform this service within the Washington Terminal, nor has the Washington Terminal company the right to permit or require these tenant line employes to perform this work within the Washington Terminal.

In support of our position we submit herewith copy of agreement dated July 27th, 1934, covering manning of construction trains within the limits of the Washington Terminal during the electrification work by the Pennsylvania Railroad, signed by the General Chairmen on the various railroads, who met at the request of the railroads that they reach an agreement among themselves regarding the manning of this construction train service. After this agreement was reached it was accepted and recognized by the managements in the settlement of disputes.

An opportunity for oral argument is requested.

Washington, D. C., July 27, 1934

AGREEMENT.

IT IS HEREBY AGREED, That the Washington Terminal crews will man all of the trains used in the construction work on the Washington Terminal rails in connection with the electrification work, and that R. F. & P. crews will man all of the trains used in construction work on the R. F. & P. rails (Potomac Yard) in connection with the electrification work; that P. R. R. crews will man all assigned crews that might be assigned to the so-called trouble trains (wire trains) except such trains as are assigned exclusively to the Washington Terminal or Potomac Yard, such trains to be manned by men holding seniority on the respective railroads.

Manning of construction trains working on two or more of the rails of the Pennsylvania R. R., Washington Terminal Co. or R. F. & P. R. R. will be divided proportionately on a time basis, the basis of time consumed on the respective properties.

(Signed) J. M. MCCORMICK,
W. C. KNOWLES,
H. E. CORE,
W. A. CULP,
General Chairmen, Pennsylvania, R. R.
J. D. HITE,
J. K. WILLIAMSON,
H. M. COUSINS,
General Chairmen, R. F. & P. R. R.
R. E. TYDINGS,
S. W. HANDY,
General Chairmen, Washington Terminal Co.

Reply of the Washington Terminal Company to Ex Parte Submission, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen versus Washington Terminal Company:

STATEMENT OF CLAIM: "It is the practice of the Washington Terminal Company to require tenant line road engines, manned by tenant line road engine crews, to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot,

and perform other switching service on tracks of the Washington Terminal. Road engine crews of the Southern Railway, the C. & O., and the R. F. & P., all tenant lines, have been required to remain on their engines and turn their trains before delivering to the coach yards. Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

POSITION OF CARRIER: 1. The movements related in the Statement of Claim may be properly grouped as follows:

A—Passenger Road Engine crews moving empty cars from Union Station to the Coach Yards or from the Coach Yards to the Union Station.

B—Inbound Passenger Road Engine crews moving car or cars on head end of certain trains after arrival of train in station and placing same on another track to facilitate movement of train through Terminal.

C—Outbound Passenger Road Engine crews of certain trains taking head end at Washington, couple to cars on adjacent tracks, moving such car or cars to head end of outbound train when backing against such train, completing the train ready for departure.

are recognized operating practices, and protected in their working agreement.

2. All such movements described in each of the above groups are in charge of a Yard Conductor designated and known as Back-up man, who is covered by agreement between the Washington Terminal Company and the representatives of the Brotherhood of Railroad Trainmen, dated April 1, 1924; Article 16 of which agreement reads as follows:

"BACK-UP MEN AND PILOTS

"(a) Back-up men will be paid Conductor's rate and their starting time to begin work will be between the hours of 6:30 A. M. and 8:00 A. M.; 2:30 P. M. and 4:00 P. M.; 10:30 P. M. and 12:00 Midnight, except where the service is curtailed to 16 hours in any 24 hour period, when the first assignment will be between the hours of 6:30 A. M. and 10:00 A. M.; and the second not later than 10:30 P. M.

"(b) Picking up or setting off cars by men in Back-up service will not be considered switching service.

"(c) 48 hours advance notice will be given of changed starting time of regularly assigned Back-up man.

"(d) Pilots will receive Conductor's pay. Their hours of work will be subject to requirements of service."

3. All Terminal movements of passenger road engine crews with cars are in charge of a Yard Conductor (Back-up man) and the provisions of Schedule Rule 16 in effect on the Washington Terminal, so far as the Brotherhood of Railroad Trainmen is concerned, are fully satisfied, protected and fulfilled, and the Brotherhood of Railroad Trainmen, therefore, have no proper claim before the Board. These Enginemen and Firemen are paid for performing such service in accordance with their pay schedules provided for in regulations of their respective employing Railroad Companies. The Railroad Companies render bill to The Washington Terminal Company in reimbursement. Tenant Line road crews move only cars of their own train *and no other cars* and perform no switching in making up and dispatching of trains not permitted under the appropriate Schedule of the Tenant Lines and not supported by Terminal employes' agreement, and it has always been recognized that road crews would be required to handle cars in their own train.

4. These movements are not only clearly permissible under existing regulations and agreements but constitute a practice about as old as Washington Terminal itself, which on November 17th, 1937, was thirty years old, and have been acquiesced in throughout that long period of time.

5. February 4th, 1918, the Committee representing Yard Trainmen on Washington Terminal took up with the Management the practice of Yard Brakemen being used in Back-up service and requested that the service known as Back-up service on Washington Terminal be performed by competent Conductors. The request of the Employes was given due consideration and effective April 1st, 1918, nineteen (19) years ago, it was arranged that Yard Trainmen assigned to Back-up service would be qualified Conductors and paid Conductor's rate and clearly covered by agreement to perform the service herein complained of. Such classification and compensation has continued since April 1st, 1918, and is still in effect.

6. As further evidence of the clear understanding of their acquiescence in and the existence of an agreement in Back-up service, invite attention to Article 16 which was contained in the combined Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen of the Washington Terminal Railroad issued by the United States Railroad Administration, effective December 1st, 1919. That Article provided as follows:

51

"PILOTS AND BACK-UP MEN.

"(a) Back-up men will be classified as Conductors and paid Conductors' rate.

"(b) Enginemen or Firemen used as Pilots will be allowed Enginemen's pay; Yardmen used as Pilots will be allowed Conductors' pay."

7. Not only are the movements of the character described made as a matter of right and by force of practice and agreement; the necessity for them has existed for thirty (30) years since the opening of the Terminal in 1907 and because that they were necessary, they were so recognized and provisions made by agreement for compensation. They were and are considered necessary to the proper operation of the Terminal and their continuance through the long period of years has only been interupted to the extent required to meet changed conditions. To do anything different than this generally accepted practice would entail an added burden of increased Terminal time of trains and materially increase movements to such an extent they would prove an interference with orderly movements through interlockings and produce inefficient operation, to the detriment of the service. It would be particularly prohibitive in times of extraordinary occasions such as holiday movements and extraordinary travel incident to the Inaugural celebrations of the President of the United States.

8. These questions have been and are still well understood by the Employes and the Management. Numerous conferences have been had at which this subject was discussed, the Management being impressed with the apparent attitude of the Employes that their objection was not so much to the movements being handled by Back-up men and road engines as to such service being possibly extended to the point where it would be really hurtful to them. Experience, however, has not shown this to be a fact.

9. While more recently the Employes have sought to eliminate these movements regardless of the fact that they have been sanctioned by custom and practice and covered by agreement extending over many years, together with regulations and working agreements, the Management does not consider there is any proper claim. There is not and has not been any violation of agreement and what is being done is by custom, practice and agreement, varying in existence to as much as thirty

(30) years. There is no basis for any dispute in these circumstances and claim should be denied.

10. The Statement of Facts contained in the submission of the Employes in the judgment of the Carrier contains no relevant or useful information as to Statement of Claim which they have set forth. The service undertaken by the Carrier in pursuance of legislative enactment is self-evident. The employment and seniority of Terminal Company by transfer from the B. & O. R. R., P. E. & W. R. R. and Sou. Rwy., (Roads on which formerly employed) has been fully and completely recognized and protected, and there is no basis for any claims or intimations to the contrary. The rules quoted by the Employes with reference to Seniority, Filling of Positions by Advertisements, etc., have not the remotest connection with the claim they have presented beyond one reference, and that has to do with men in Back-up service who perform such service in pursuance of and under the terms of Article 16 of the Agreement and as to these men there is no question as to the strict application of seniority and job assignment regulations. The apparent reason for reference to the Seniority rules and Assignment provisions would seem to be their application to Road Enginemen and Firemen who perform the service in connection with the Back-up men. Such a position is entirely untenable because the Road Enginemen and Firemen are not employed by the Washington Terminal Company and do not perform a switching service, as the movements which they do handle are specifically provided for in the current schedule as *being excluded* from switching movements.

11. From the foregoing it will be apparent and the Management respectfully so submits, that the movements referred to in Statement of Claim of Employes are proper and in no way violate any agreement for the following reasons, in fact, are fully covered and protected by agreements:

(a) By custom and practice have existed about since the Terminal was opened in November, 1907, approximately thirty years.

(b) By reason of such practice throughout such a long period of time have been clearly acquiesced in by the interested employes.

(c) That such acquiescence has not only been amply demonstrated in practice but ratified in working agreements including the current regulations.

(d) That Service performed by Back-up men in accordance with Schedule provision is in conformity with current schedule and carries with it compensation provided for same and is maintained with strict compliance to seniority and assignment rules. If the request of these employes in this case were sustained it would nullify the Back-up Rule in the Washington Terminal Agreement with its Trainmen (Article 16) herein quoted and unjustifiably disregard and abandon practice and custom acquiesced in for approximately 30 years.

(e) Setting off and picking up cars under present schedule is definitely defined as not being considered switching and said movements are in charge of a Back-up man handled by road engine manned by Road Engineman and Fireman, whose use together with service of Back-up man constitutes what is known now and as always, as Back-up service. That the movements handled by road engines in charge of Back-up man are associated with and a part of the individual train of the Engineman and Fireman handling such movements and that for such service performed they are compensated in accordance with provisions of current schedules with their respective Railroad employing companies.

These movements are, therefore, not subject to the objection set forth by the Employes. In other words, these movements are made in pursuance of long established custom and practice acquiesced in by the in-

terested employes under agreement properly negotiated and are clearly permissible under current existing schedule. This is only another way of stating that there is involved only a proper exercise of the rights of the Management and men employed in making the movements referred to.

12. At a conference held on December 2nd, 1936, between Messrs. A. J. Lovell, Vice President, Brotherhood of Locomotive Firemen and Enginemen, and J. A. Farquharson, National Legislative Representative of Brotherhood of Railroad Trainmen, and Mr. C. W. Galloway, Chairman of the Board of Managers of the Terminal Company, discussion was had on certain subjects in question, and following that conference, by letter dated Dec. 14th, 1936, Mr. Galloway advised the said Lovell and Farquharson, that at their request, that pick-ups and set-overs be limited to one movement, which refers to the setting over and picking up of head end of passenger trans, had been accepted and agreed to and that instructions had been issued accordingly; such amendment in the practice relating to this movement has been in effect since said date. From this it is clear that the practice was changed by agreement with the Chairman of the Board of Managers and in full force, and it amounted to *change in contract*—the creation of a new agreement so far as this item is concerned—and not the recognition of any violation of any agreement then in existence. This fairly illustrates the difference between *violations* of agreements in existence and the *creation of new agreements* by the way of amendments to old agreements long recognized by acquiescence, as in this case.

53

13. It is most respectfully insisted that what is actually being attempted in this case is to ask your Board to make a new agreement. Contracts may exist by acts of the parties, consistently carried out and acquiesced in over a period of many years, just as effectively as if the terms were reduced to writing and signed. This is the case here. A contract by acquiescence of all the parties has been in existence for 30 years. Your Board is asked to create a new contract. Of course it is well known that is not a function of your Board, but of the Mediation Board.

14. This Company feels your Board is without jurisdiction to change the practices that have been in existence for thirty years and acknowledged by the organizations now appealing to your Board by the fact that they negotiated the agreement to pay employes represented by them when used in such service. It therefore cannot be claimed that there has been any violation of the working agreement, and the fact that in all the years they have worked under this agreement there has been no question until recently, and it is for this reason the Washington Terminal feels your Board is without jurisdiction, because if there is any question it is one that should be negotiated in the same form and manner that the existing rule was negotiated, and with the protection of the law under the Amended Railway Labor Act. In this case the agreement is not in question; they are asking your Board to change an agreement. Therefore, there can be no dispute so long as the agreement is complied with, about which we repeat there is no question.

15. It is admitted that the agreement exhibited with the Employes' submission made on July 27, 1934, was entered into to cover the electrification of certain tracks within the Washington Terminal area for Pennsylvania Railroad exclusive electric operation. The very fact that such an agreement was made to cover this limited purpose is conclusive evidence that the practice, which had existed prior to that time and still exists in general amounted to an agreement by acquiescence well recognized by all parties in interest.

16. The Carrier respectfully calls attention of this Board to the rights of using Railroads to use the tracks and the facilities of the Washington Terminal Company. It has been recognized and observed by Carriers and Employes that under trackage agreements where one Road uses the tracks of another Road, the rights of employes of the

Company whose tracks are used are in no way infringed upon by such use; that in use of the terminal facilities of an owning company by a tenant line, such as use by tenant lines of Washington Terminal Company tracks, employes of tenant lines may properly be required to prepare and dispose of their own trains under the Schedule provisions existing between the tenant road and its employes without in any way encroaching upon the rights of employes of the owning company. Schedule rights remain with the road employes and are not set aside nor reliquished simply because service is performed on another property over and on which the employer has trackage and other rights. This principle was definitely recognized by this Board in Award No. 1763, Docket 3241. In that case there was no question presented of any alleged conflict in rights as between employes of two separate Companies. The Roadmen performed service on the property on which their employer has trackage rights. The rights of those Roadmen and rights of their employing railroad on the property of another railroad was recognized by this Board in that Award. In this case no different situation is present.

17. The Washington Terminal Company desires to call attention of your Honorable Board to the fact that prior to the construction of the Washington Terminal the various Roads operating into the different Stations in Washington made all and even more movements with road crews in picking up or setting off head ends, as to a somewhat limited extent has been the case for some thirty years in the Washington Terminal, and about which this complaint is before you, and the Terminal employes who were taken into the service were in the main from lines whose facilities were abandoned at the time of the opening of the Terminal. It was not intended that the individual requirements in the separate stations should be changed, restricted or penalized by operation in the Union Terminal, yet the practice in this direction has been materially reduced comparatively, and this has obviously been recognized for a period of practically thirty years. And again, we wish to emphasize our claim that there has been no violation of any agreement, and repeat our opinion that the case is not one that properly belongs before your Board.

18. The Carrier respectfully submits that to agree with the Position of the Employes in support of their Statement of Claim would deny rights of both Management and the men affected and deprive the employes of compensation which they receive from exercising their rights to their detriment and loss, and would be a miscarriage of justice—therefore the Carrier requests that the rights of both Management and men be upheld by denial of this claim.

And opportunity for oral presentation is requested.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of First Division

Attest: (Sgd.) T. S. McFARLAND,
Secretary.

Dated at Chicago, Illinois, this 24th day of October, 1938.

54 *Answer of Defendants*

Filed February 15 1939

* * *

First Defense

The defendants say that the allegations of the complaint fail to state a cause of action against the defendants.

Second Defense

The defendants say that the allegations of the complaint do not state a cause of action appropriate for the granting of a declaratory judgment against the defendants because:

(1) The complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.

(2) The complaint affirmatively shows that there exists a remedy specially provided by statute for this type of case.

(3) The complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

(4) The complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff.

Third Defense

1. The defendants admit the truth of the allegations contained in Paragraphs 2, 3, 5, 6, 7, 8, 11, 12, 13, 14,
55 15, 16, 19, 21, 24, 26 and 27 of the complaint, and admit that the Exhibits attached to the complaint are true and correct copies of various documents as indicated by their headings.

2. The defendants deny the allegations contained in Paragraphs 30, 31, 32 and 33 of the complaint.

3. The defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraphs 17, 23 and 25 of the complaint, and hence deny the same for want of such knowledge.

4. Further answering, the defendants say that on February 1, 1923 there was executed by and between the plaintiff and certain persons employed by it as locomotive enginemen and firemen a certain agreement known as a "Schedule of Rules and Rates of Pay for Enginemen and Firemen". The said employees were represented in the premises by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, the said two Brotherhoods acting through the then General Chairmen of their local organizations. The said Schedule constituted an agreement concerning the rates of pay, rules and working conditions of the said classes of employees. "Exhibit D", attached to the complaint, is a true copy of this Schedule.

5. Articles 8 and 9 of the said Schedule guarantees to the said classes of employees, and to the defendants as members of the said classes, certain rights in connection with their employment regarding promotions, furloughs (in the event of reduction of forces), reinstatements (in the event of increase of forces after prior reduction), choice of positions, filling of vacancies, and the filling of new positions. The said rights consisted of certain recognized preferences among the individual employees in regard to the above matters accorded to them in ratio of their respective periods of service. These rights were, and are, termed "seniority rights".

56 6. Shortly after the execution of this Agreement there arose a dispute between the plaintiff and the defendants, members of the classes of engineers and firemen, as to the correct interpretation and application of the terms thereof. The defendants contended, and still contend, and here allege, that the true intent and purpose of the said Agreement was, and is, to provide that all work generally classified as that of yard engineers or firemen performed upon the tracks of the plaintiff, was and is to be done by the employees of the plaintiff exclusively, they to have rights to, and choice of, the said work in ratio of seniority. The plaintiff, however contended, and still contends that it has the right under this Agreement to secure the services of the employees of other railroads to perform certain of its functions for it, regardless of the seniority rights of the defendants.

7. Acting on this interpretation of the Agreement, the plaintiff maintained, and still maintains, the following practice:

As alleged in Paragraphs 5 and 7 of the complaint the entire business of the plaintiff consists in the operation of a passenger terminal in the City of Washington, D. C., into which run the trains of several main line railroads, termed the Tenant Lines. These lines operate passenger trains from, into and through this terminal, using their own road engines and crews for the purpose. The practice of the plaintiff, which gave rise to the dispute in question, was and is to permit and require the train crews of the Tenant Lines to use the said road engines in the moving of empty and loaded cars and trains of cars from place to place in the yards of the plaintiff, when such movement does not constitute a portion of any through train run, but does constitute a switching service in the said yards.

57 The defendants say further in this connection that at present, and for a long period of time in the past, the plaintiff and the Tenant Lines have recognized that the services described above are properly services of and for the plaintiff, and which it could be required to render. It has been, and now is, the practice to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services.

8. Attempts were made from time to time, subsequent to 1923, to adjust this dispute but without success.

9. On June 21, 1934 the Congress of the United States enacted a statute known as the "Railway Labor Act" (45 U. S. C., Section 151-163 inclusive), amending an earlier statute known by the same name. In Section Three of the said Act (45 U. S. C., Section 153) provision was made for the establishment of a tribunal known as the National Railroad Adjustment Board. The said Board was given jurisdiction to hear, decide and adjust "disputes between an employee or group of employees and a carrier or carriers growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". (U. S. C. Title 45, 153 i.)

10. The said statute further provided that the said Board should be divided into four divisions. The First Division to "have jurisdiction over disputes involving employees in train and yard service, and that the said First Division should consist of ten members, five to be selected by the carriers generally, and five by the national organizations of employees whose members were employed in the service indicated. Subsequent to the passage of the said
58 statute the employees, acting through their national organizations, and the carriers (the plaintiff among others) acting through their national association, selected their representatives as members of the National Railroad Adjustment Board, First Division, and the said Board was organized and entered upon the performance of its functions.

11. It was further provided by the said Statute that all decisions of each Division of the said National Railroad Adjustment Board should be by a majority vote of its members, but in the event that the members should be evenly divided as to any case, the Division in question should have authority to select a neutral referee to sit with it and render a decision.

12. After the enactment of the Railway Labor Act the defendants, through their representatives, made further efforts to adjust with the plaintiff the dispute above described, which had been pending since 1923. These efforts met with no success, and the defendants requested the plaintiff to join with them in a joint submission of the dispute to the National Railroad Adjustment Board, First Division. This the plaintiff refused to do. Thereafter, as authorized by the provisions of the Railway Labor Act, the defendants, through their representatives, themselves prepared and filed with the National Railroad Adjustment Board, First Division, their submission of the dispute. The plaintiff was duly notified of this fact, and it thereupon filed its own submission, stating fully its contentions in regard to the matter. The said submissions contained any and all facts, data and arguments which the parties considered relevant to the issue. After due notice and hearing, at which representatives of both the plaintiff and defendants were present, the National Railroad Adjustment Board, First Division, found itself unable to agree upon an

award, and called in a neutral referee as authorized
59 by the Railway Labor Act. The said referee examined and passed upon the contentions of the parties, and decided the dispute in favor of the defendants. The said decision was embodied in an award of the said Board, a copy of which is attached to the complaint as "Exhibit F". Thereafter the said National Railroad Adjustment Board, First Division, issued its order to the plaintiff commanding it to comply with the terms of the said Award, all as set forth in Paragraph 27 of the complaint.

13. After the issuance of the said order the defendants requested the plaintiff to comply with, and apply the said order of the National Railroad Adjustment Board, First Division. This the plaintiff refused, and still refuses, to do. Further efforts have been made by the defendants since the issuance of the said order to adjust their differences with the plaintiff by negotiations, but without success. Thereupon the individual defendants have from time to time filed with the plaintiff claims for compensation for work which, under a proper interpretation of the Agreement of February 1, 1923, and under the order of the National Railroad Adjustment Board, was rightfully work which the defendants should have performed, and for which they should have been compensated, but the performance of which has been secured by the plaintiff through the employment of road crews of the Tenant Lines.

14. Section Three, Paragraph m. of the Railway Labor Act (45 U. S. C. Section 153 m.) declares that any awards or orders of any Division of the National Railroad Adjustment Board shall be "final and binding upon both parties to the dispute except insofar as they shall contain a money award". The Board, however, is given no power to enforce its awards or orders by process, and no power to institute legal proceedings looking to their enforcement. In case
any carrier refuses to comply with any order of any
60 Division of the Board, it is provided that:

"The petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides, or in which is located the principal office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order

of the Division of the Adjustment Board in the premises." (U. S. C. Title 45, Section 153, p.)

It is further provided in this same paragraph as follows:

"Such suit in the District Court of the United States shall proceed in all respect as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

It is also provided that the right to bring any such action for enforcement is limited to two years.

The defendants say that the true intent and purpose of the provisions of the Railway Labor Act above mentioned in this paragraph is to provide a method for the enforcement, and a provision for the judicial review of awards and orders of the National Railroad Adjustment Board, especially adapted to the type of case, and that such method of enforcement and review is exclusive.

15. Further answering the defendants deny each and every allegation of the complaint not heretofore denied, or denied for want of knowledge, or not admitted herein to be true.

16. The defendants therefore say that the plaintiff is entitled to no relief in the premises, and in particular is entitled to no relief by declaratory judgment be-
61 cause:

a. The Schedule or Agreement of February 1, 1923, properly interpreted, does not permit the practice for the continuance of which the plaintiff is contending, i. e., the practice of using road engines and crews for the purpose of moving cars or trains of cars upon the tracks of the plaintiff when such movement forms no part of the through run of any train.

b. There is no actual controversy between the parties hereto inasmuch as any dispute or controversy which may

have existed in the past has been decided and adjudicated by the National Railroad Adjustment Board, a tribunal having special jurisdiction by statute to decide such disputes or controversies.

c. The practice and procedure of the National Railroad Adjustment Board in this case secured to the plaintiff a full and fair hearing, and a full and fair opportunity to present all facts and arguments which it considered relevant to the case.

d. Remedy by declaratory judgment cannot be invoked to review a decision of an administrative tribunal where a specific means of review has been provided by statute for the type of case in question.

62 WHEREFORE, the defendants pray judgment of the Court that the complaint of the plaintiff be denied and dismissed at the plaintiff's costs.

FRANK L. MULHOLLAND
CLARENCE M. MULHOLLAND
WILLARD H. McEWEN
HAROLD C. HEISS
RUSSELL B. DAY
WILLIAM E. WILLIS
Attorneys for the Defendants.

Order Assigning Defenses for Advance Hearing

Filed March 2- 1939

* * *

Upon consideration of the plaintiff's motion to call up defenses for preliminary hearing, filed herein on February 21, 1939;

It is ORDERED this second day of March, 1939, that defendants file their points and authorities in support of their First Defense and in support of their Second Defense, incorporated in their said answer of February 15, 1939, on or before March 20, 1939, and that the plaintiff file its points and authorities in opposition thereto within fourteen (14) days thereafter, and that said First Defense

and said Second Defense thereafter shall be placed on the Motions Calendar for hearing in regular order.

JENNINGS BAILEY
Justice.

We consent:

FRANK L. MULHOLLAND
WILLIAM E. WILLIS
Attorneys for defendants.

SYDNEY R. PRINCE, JR.
Attorney for plaintiff.

63 MEMORANDUM BRIEF OF DEFENDANTS
Filed March 20, 1939

* * *

INDEX.

	Original	Copy	Print
Nature of Case	1	68	67
Statement of Facts	2	69	68
Analysis of Issues	7	74	73
Argument	11	78	77
I. A Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case	11	78	77
The rule of law	11	78	77
Procedure prescribed by the Railway Labor Act.	17	84	83
Type of Case	18	85	84
Organization and Development of National Railroad Adjusement Board	20	87	86
II. A Declaratory Judgment will not be granted as a means of reviewing the decision of another tribunal	45	112	111
III. A Declaratory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order	49	116	115
IV. The Railway Labor Act does not vest judicial power in the National Railroad Adjustment Board	54	121	120
No cause of action of any kind is stated by the complaint	71	138	137
Conclusion	72	139	138

64 APPENDIX I.

	Original	Copy	Print
Excerpts from Railway Labor Act as amended June 21, 1934	75	142	141

APPENDIX II.

Excerpts from Memorandum of Understanding Incorporated in General Order No. 13 of the Federal Director-General of Railroads issued March 22, 1918	82	149	148

APPENDIX III.

Excerpts from Agreement Establishing Southeastern Regional Board of Adjustment under the Provisions of Title III of the Transportation Act of 1920	85	152	151

APPENDIX IV.

Excerpts from the Interstate Commerce Act and the Packers and Stockyards Act	88	155	154
Interstate Commerce Act	88	155	154
Packers and Stockyards Act	89	156	155

TABLE OF CASES

Aetna Life Insurance Co. vs. Quarles, 92 Fed. (2d), 321	16	83	82
Alabam's Freight Co. vs. Hunt, 29 Ariz. 491	60	127	126
Back's Gdn. vs. Bardo, 234 Ky. 211; 27 S. W. (2d), 260	46	113	112
Bell Telephone Co. of Penna. vs. Lewis, 313 Pa. 374; 169 Atl. 571	14	81	80
Central High School Athletic Asso. vs. City of Grand Rapids, 274 Mich. 147; 264 N. W. 322	48	115	114

	Original	Copy	Print
City of Erie vs. Phillips, 323 Pa. 527; 187 Atl. 203	14	81	80
Crowell vs. Benson, 285 U. S. 22	60	127	126

Davis vs. American Foundry Equipment Co., 94 Fed. (2d), 441	50	117	116
E. Edelmann & Co. vs. Triple-A Specialty Co., 88 Fed. (2d), 852	51	118	117
Ferree vs. Ferree, 273 Ky. 238; 115 S. W. (2d), 1055	47	114	113
Gen. Investment Co. vs. N. Y. C. R. R. Co., 271 U. S. 228	56	123	122
Grooms vs. Grooms, 225 Ky. 228; 7 S. W. (2d), 863	47	114	113
Haan vs. Haan, 231 N. Y. Sup. 58	48	115	114
Kings Co. Trust Co. vs. Melville, 216 N. Y. Supp. 278	48	115	114
McCalmont vs. McCalmont, 93 Pa. Sup. Crt. 203	14	81	80
Meeker vs. Leigh Valley R. R. Co., 236 U. S. 412	36	103	102
Minds vs. Penna. R. R. Co., 237 Fed. 267	42	109	108
Moore vs. Louisville Hydro-Electric Co., 226 Ky. 20, 10 S. W. (2d), 466	15	82	81
Oren vs. Swift & Co., 51 S. W. (2d), 58	58, 60	125	124
Pa. R. R. vs. U. S. Railway Labor Board, 261 U. S. 72	29, 69	96	95
Pa. System, etc. vs. Penna. R. R. Co., 267 U. S. 203	29	96	95
Petition of Kariher, 284 Pa., 445, 131 Atl. 265	13	80	79
Prentis vs. Atlantic Coast Line Co., 211 U. S. 210	56	123	122
Shea vs. North-Butte Mining Co., 55 Mont. 522; 179 Pac. 499	57, 60	124	123
Southern Ry. Co. vs. Eichler, 56 Fed. (2d), 1010	36, 62	103	102
State of R. I. vs. State of Mass., 12 Peters Reports U. S. 657	55	122	121

	Original	Copy	Print
Stewart vs. Hertin, 125 Neb. 210, 249 N. W. 552	15	82	81
Stuart vs. Norviel, 26 Ariz. 493	56	123	122
Sullivan vs. Union Stockyards Co., 26 Fed. (2d), 60	36, 63	103	102
Tracy vs. Commissioner of Int. Revenue, 53 Fed. (2d), 573	59	126	125
Wheeling Corrugating Co., vs. McManigal, 41 Fed. (2d), 593	60	127	126
Young vs. Bridges, 86 N. H. 135, 165 Atl. 272	15	82	81

TABLE OF STATUTES CITED

Federal Declaratory Judgments Act, U. S. C. Title 28, Article 400, Paragraph I	45	112	111
Interstate Commerce Act, Sec. 16	35-88-89	102	101
Packers and Stockyards Act	35-89-91	102	101
Railway Labor Act, 1926			
Section 3	30-31	97	96
Railway Labor Act as Amended June 21, 1934	75	142	141
Section 3, Paragraph First (i)	19, 76	86	85
Section 3, Paragraph Second	33, 80	100	99
Section 3, Paragraph First (m)	34, 78	101	100
Section 3, Paragraph First (p)	34, 52, 78	101	100
Transportation Act of 1920			
Section 301	27	94	93
Section 302	28	95	94
303	28	95	94
304 (1)	29	96	95
307 (a)	29	96	95
United States Constitution, Article III, Sec. I	54	121	120

 TABLE OF MISCELLANEOUS CITATIONS

	Original	Copy	Print
American Jurisprudence, Vol. 14, page 364	55	122	121
American Jurisprudence, Vol. 16, page 295	12, 46	79	78
Borchard on Declaratory Judgments	13, 45	80	79
Federal Court Rule No. 57	11	78	77
General Order No. 13 Federal Director-General Railroads	23, 82	90	89
Report of Conference Committee re Federal Court Rule No. 57	11	77	76
Report of Walker D. Hines, Director-General of Railroads	24, 25, 26, 27	91	90
Report of Committee of the House of Representatives on Interstate and Foreign Commerce re Railway Labor Act	68	135	134

Memorandum Brief of Defendants

Filed March 20 1939

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NATURE OF THE CASE

The motion of the plaintiff calls to the Court's attention the fact that the first two defenses of the answer raise legal issues. The defenses in question are in brief: (1) that the complaint fails to state a cause of action under the Declaratory Judgments Act, and (2) that the complaint fails to state any cause of action.

2

By its motion the plaintiff has called upon the defendant to support these defenses in a hearing prior to trial, a procedure sanctioned by the new Federal Court Rules. As we understand this procedure, the ordinary rules regarding motions to dismiss are applicable, i. e., all facts well pleaded in the complaint must be considered as being admitted. Our first task, therefore, will be to endeavor to formulate from the complaint a fair statement of the facts in the case.

STATEMENT OF FACTS

In 1907 the plaintiff company began its operations which have, throughout its existence, consisted in the furnishing of passenger terminal facilities for certain carriers referred to in the complaint as "Tenant Lines". Its tracks are purely switching and terminal tracks; it operates no main line road service; its locomotive and train crews engage in switching operations only.

It is the practice of this carrier that all through trains coming into the station are brought in by the road engines and crews of the tenant line on which the train originates. No question is raised regarding this practice. In addition, however, it is further the practice to require these same engines and crews to perform certain operations in connection with the making up and breaking up of trains. Cars are added to, or taken from, trains; empty trains are moved into or out of the station, and are, to some extent, moved about in the yards by these road engines. It is claimed that this service

is not a "switching" service, but it is apparent that certainly it is not in any sense a road service. This practice of using road engines and crews, furnished by the tenant lines, in performing the operations in question is the *practice* which has given rise to dispute.

It remains to consider the reason why the propriety of this practice is in question. It appears from the complaint that at intervals from 1910 to 1923 various schedules or agreements as to working conditions affecting train crews were effective on this property. The first two of these were posted by unilateral action of the carrier, the third was negotiated between the Director General of Railroads and the various brotherhoods representing the classes of employees involved, and the last was negotiated by the carrier and the brotherhoods and is still in effect.

This last agreement, as well as its predecessors, contained provisions regarding the seniority rights of employees. At this point we believe it may prove helpful to the Court to explain the significance of the term "seniority right". The word "seniority" refers to the length and continuity of service of employees in relation to one another. "Seniority rights" are those rights which, by agreement, accrue to the individual employees in ratio of their seniority. The various Exhibits attached to the complaint, and in particular Exhibit C, Paragraphs 8 and 9, and Exhibit D, Paragraphs 8 and 9, show the nature of these rights. It appears that in the event of lay-offs employees are to be released in inverse

order of seniority, while re-employment is to be in direct order of seniority. Demotions and promotions are to be handled in the same manner. In the event of a vacancy, or in the event of the establishment of a new position, employees are to be notified by bulletin, and they may "bid" for the position—seniority to govern in the selection. The above list of seniority rights provided by this agreement is not exhaustive, but is illustrative as to their nature, and as to the reason why they are valued and jealously guarded by employees.

It must be apparent that the use of the term "seniority rights" implies the existence of a *territorial unit* within which those rights may be exercised; that is, on a certain unit of railroad operations there are a certain limited number of jobs available to those employees who have seniority rights within that unit. Such units are ordinarily termed "seniority districts", and, in the case of train service men, are usually the operating divisions or groups of divisions of the railroad. In the case of smaller operations, as here, the entire system of the railroad may constitute a single seniority district.

Seniority rights which are not effective over a fixed district are necessarily valueless, as the carrier might, by expanding or contracting districts at will, virtually nullify the rights of employees by limiting or eliminating the area within which they might be exercised.

From the foregoing we may clearly understand the nature of the controversy which has existed between the plaintiff and its train service employees. It is the contention of the latter that they have a right under the

5

Agreement of 1923 to perform all work in the nature of switching service which is carried on over the tracks of the plaintiff, i. e., their seniority district. It is the contention of the plaintiff that the work performed by the road engines, while not mentioned in the Agreement, is excepted from its provisions because it has been performed by road crews both before and since the effective date of the Schedule. In other words, the plaintiff contends that by custom and usage this work, while admittedly performed over the plaintiff's tracks, is really not the work of the defendants' seniority district, but it forms a sort extra-territorial extension of the various seniority districts of the road crews of the tenant lines. This the plaintiff contends is a part of the Agreement by implication.

It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923, and that it has existed for some time.

Efforts were made from time to time to adjust this dispute in conferences between the parties, but without success. Thereafter, the dispute was duly submitted by the employees to the National Railroad Adjustment Board, First Division, for adjustment. This Board is an administrative tribunal set up in accordance with the provisions of a Federal statute known as the Railway Labor Act as amended June 21, 1934. (Relevant portions of this Act are copied in Appendix 1.) We shall discuss

the organization and functions of this Board in another section of this brief. It will suffice for our present purpose to note that in the adjustment of this dispute the Board was confronted with the necessity of considering the proper interpretation of the agreement in question. The procedure of the Board as established by the statute and applied in this case will also receive full discussion later herein.

After considering the whole case the Board issued a formal award embodying a decision favorable to the contentions of the employees, and subsequently issued an order to the plaintiff to apply the said award. It should be noted that orders of the National Railroad Adjustment Board are not enforceable by any process or action on the part of the Board. They depend for their enforcement upon suits instituted in the Federal courts by the parties benefited by the order.

The defendants have requested the plaintiff to apply the order of the Board. This the plaintiff has refused to do with the result that certain claims are accumulating against it for work which the defendants claim to be entitled to perform, and which the plaintiff has permitted the employees of the Tenant Lines to perform in their stead.

The plaintiff now brings this action seeking a declaratory judgment.

7

ANALYSIS OF ISSUES

The relief which the plaintiff seeks is two-fold. First, it asks an interpretation of its rights and those of the defendant under the Collective Agreement of February 1, 1923; second, it asks the Court to invalidate the award and order of the National Railroad Adjustment Board both because of errors of law alleged to have been committed by the Board, and because of the asserted unconstitutionality of the Railway Labor Act which established the tribunal and fixed its jurisdiction.

Otherwise expressed, the plaintiff desires this Court to set aside a decision of an administrative board, to reexamine the subject matter of that decision, and to issue its own judgment on the merits. Without question, therefore, the action is one looking toward a judicial review of an administrative order. This review is sought through the medium of a declaratory judgment.

The defendants have challenged the sufficiency of the complaint on the ground that it does not set forth facts sufficient to justify the issuance of a declaratory judgment and indeed fails to state any cause of action at all. The latter of these two positions will be reserved for a later section of this brief, and we will for the present confine ourselves to the first.

Prior to the enactment of the Declaratory Judgments Act (U. S. C. Title 28, Article 400), the jurisdiction of the Federal Courts was in general limited to controversies involving the classical conception of a cause

of action, i. e., a right, its violation and consequent damage. The Act extended that jurisdiction by eliminating the requirement of actual violation of a right and resulting damage and substituting therefor the requirement merely of an actual controversy as to the existence of rights. Thus, where such a controversy exists the litigant needs not violate his adversary's claimed right before testing its existence in Court. This broad extension of jurisdiction, however, is qualified by certain well defined limitations which have been placed upon it.

First. It is well established that it is not the purpose of the Declaratory Judgments Act to permit the Courts to give advisory opinions on abstract legal questions. In the words of the statute, an "actual controversy" must exist. That is, there must be such a disagreement between the parties as to the existence of mutual legal rights and obligations that a proposed course of action by one party will result in the imposition of legal damage upon him if he is mistaken in his contention. Thus for a party to be able to invoke the Declaratory Judgments Act, he must show that the subject matter of the controversy is such as to imperil him or threaten him with liability for damages. As above noted, the plaintiff is seeking two declarations from the Court. The first being an interpretation of an agreement, the second a declaration of the invalidity of an order of the National Railroad Adjustment Board. Before the plaintiff can secure relief as to either of these matters it must establish that the agreement in the one case, or the order of

the Board in the other, may be interpreted in such manner as to actively imperil the plaintiff's rights. The order of the Board is not susceptible to such an interpretation, however. We will point out below that the order is in itself unenforceable, and that the plaintiff has not shown, and cannot show, any possible injurious consequences to itself arising from that order however it may be interpreted.

Second. From what has been said it is apparent that the Declaratory Judgments Act was designed as a method of deciding *undecided* controversies, not as a method of re-submitting to the Court issues already passed upon by a different tribunal, with the hope of obtaining a different result. In other words, the procedure established by the Act is not a procedure for *review.* As the gist of the plaintiff's action in this case is to secure such review, its complaint is fatally defective.

Third. It is agreed by all authorities that the procedure of the Declaratory Judgments Act may not be used as a substitute for a procedure specially provided by statute for the type of case in question. We will show that the Railway Labor Act provides a statutory method for the review of decisions of the National Railroad Adjustment Board, which method forms an integral part of the regulatory scheme of the statute. It follows, therefore, that the procedure invoked in this action cannot be substituted for that provided in the Railway Labor Act, and on the face of its complaint the plaintiff is not entitled to the relief which it seeks.

10

Fourth. The plaintiff alleges that the Railway Labor Act is void in that it seeks to vest judicial power in an administrative board. While we believe that a consideration of the three issues named above will satisfy the Court that this is not an appropriate case for the issuance of a declaratory judgment, we shall in addition support the position that the power exercised by the National Railroad Adjustment Board is an administrative power only, and is in no sense judicial.

In summary, therefore, the defendants will maintain the following positions in support of their contention that the complaint fails to state facts sufficient to justify the Court in the issuance of a Declaratory Judgment:

I. A Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

II. A Declaratory Judgment will not be granted as a means of reviewing the decision of another tribunal.

III. A Declaratory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

IV. The Railway Labor Act does not vest judicial power in the National Railroad Adjustment Board.

11

ARGUMENT

I. A Declaratory Judgment Will Not Be Granted As a Substitute for Another Remedy Prescribed By Statute for the Particular Type of Case.

The Rule of Law.

In the early days of the Declaratory Judgments Acts and to some extent even today, there has been considerable conflict among the Courts on the question of whether one seeking a declaratory judgment must show that he has no other adequate remedy available. This conflict has been set at rest for the Federal Courts by the adoption of Court Rule No. 57 which provides that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

We mention the above doctrine and its repudiation in the Federal Courts merely for the purpose of clarifying the issue here. The defendants' objection to this proceeding is not based on the existence of another adequate remedy either at common law or in equity, but upon the existence of a specific remedy prescribed by statute for this exact type of case.

It is clearly established by authority that where such statutory remedy exists a court may not issue a declaratory judgment in the premises for to do so would nullify the provisions of the statute which sets up the special remedy.

Thus the Conference Committee which assisted in the preparation of the present Federal Court Rules in its note regarding Rule No. 57 explicitly states:

> "A declaration may not be rendered if a *special statutory proceedings* has been provided for the adjudication of some special type of case, but gen-

eral, ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

(Emphasis supplied.)

In American Jurisprudence, Volume 16, page 295, we find the following statement:

"A court will not take jurisdiction to render a declaratory judgment where another *statutory remedy has been especially provided for the character of case presented,* if the effect would be to interfere with the right of the parties to appeal to the court given jurisdiction in that particular matter by the statute. Likewise, a declaration will not be made where the purpose is to affect proceedings which may be taken before a public board which has full power to act in the matter and which would not be bound by the declaratory judgment. In accordance with this principle, the courts have refused to enter declaratory judgments in respect of such questions as the validity of assessments, the time for which an employee is entitled to compensation under the Workmen's Compensation Law, the inheritance of personal property, and the status of the plaintiff as the natural son of defendant, where jurisdiction as to these questions was given to other courts or boards."

(Emphasis supplied.)

Professor Borchard, co-author of the Uniform Declaratory Judgments Act, whose treatise on this subject has been widely quoted, states in this connection as follows:

13

"Where, however, a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose."

(Borchard on Declaratory Judgments, pages 156-7.)

(Note: Emphasis the Author's.)

And further:

"Nor as already observed, will the court permit a special tribunal having statutory jurisdiction of the express type of case sub judice, or given jurisdiction by agreement of the parties, to be ousted of its jurisdiction by a petition for a declaration in the ordinary courts."

(Borchard on Declaratory Judgments, p. 180.)

A leading case in the interpretation of the Declaratory Judgments statutes is that of *Petition of Kariher,* 284 Pa., 455, 131 Atl. 265, decided in 1925. The Supreme Court of Pennsylvania made the following statement as to the law:

"In all jurisdictions where declaratory judgment practice obtains, the rule is established * * * that a proceeding to obtain such a judgment will not be entertained * * * where another statutory

remedy has been specially provided for the character of case in hand."

See also to the same general effect, *City of Erie vs. Phillips*, 323 Pa. 527; 187 Atl. 203; and *Bell Telephone Company of Pennsylvania vs. Lewis*, 313 Pa. 374; 169 Atl. 571.

Another Pennsylvania case, that of *McCalmont vs. McCalmont*, 93 Pa. Sup. Crt. 203, involved an action for declaratory judgment seeking to annul a marriage. The relief sought was refused, the Court saying:

"The State is a party in interest in divorce proceedings and in order to guard against collusion between the parties has prescribed certain forms and procedure which must be observed, including an oath or affirmation by the libellant that the facts contained in the petition or libel are true, to the best of his or her knowledge and belief, and that said complaint is not made out of levity or by collusion and for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in said petition or libel; followed by proceedings in court or before a master calculated to sift the evidence thoroughly and satisfy the court of the truth of the matters averred in the libel * * *.

"These safeguards instituted on behalf of the the State cannot be swept away by recourse to the Declaratory Judgments Act of 1923. *It should not be resorted to where, as here, a method has already been established for the speedy determination of the issues involved with due regard to the*

15

interests of the State as well as of the parties libellant and respondent.''

(Emphasis supplied.)

In the case of *Young vs. Bridges,* 86 N. H. 135, 165 Atl. 272, a declaratory judgment was asked as to the distribution of an estate. It was held that inasmuch as jurisdiction in such matters was specifically conferred upon the Probate Court by statute, other courts could not be asked to pass thereon through the medium of a declaratory judgment. A similar conclusion was reached in the case of *Stewart vs. Hertin,* 125 Neb. 210, 249 N. W. 552, which involved a guardianship matter.

The Court of Appeals of the State of Kentucky applied the same rule of law in the case of *Moore vs. Louisville Hydro-Electric Company,* 226 Ky. 20, 10 S. W. (2d) 466. In this case the plaintiff had instituted proceedings under the Workmen's Compensation Act of the State for certain alleged injuries. His claim was allowed by the Workmen's Compensation Board as to some particulars, but was rejected insofar as it related to a claim of hernia. The decision as to the hernia was appealed to the Circuit Court and sustained, but was later reversed by the Court of Appeals and compensation ordered. Thereafter another controversy arose as to the time during which plaintiff was entitled to be compensated for the hernia, and this action was filed seeking a declaratory judgment on that point. A demurrer to the petition was sustained in the Circuit Court, which ruling

16

was upheld by the Court of Appeals. The latter court said:

> "It has been often written that the Workman's Compensation Law is *in the nature of an arbitration, and was intended to provide a simple and speedy method whereby employees might be compensated for injuries received.* The entire mechanics of the law shows that it was the legislative intent to vest exclusive, original jurisdiction to hear and determine matters within the purview of the Act in the Workman's Compensation Board. Provisions are made for a review of the findings of that board by the Circuit Court, and an appeal may be taken from the judgment of the Circuit Court to this Court. If the employee may ascertain that he and the employer do not agree about the length of time for which he is entitled to compensation, and then file a petition for a declaration of his rights, likewise the employer may ask for a declaration of rights, and in that way *substitute the Circuit Court and this Court for the Workman's Compensation Board in determining many questions, the determination of which is vested by the law in the Workman's Compensation Board. We cannot approve thus invading the jurisdiction of that Board.*"
>
> (Emphasis supplied.)

The same principle was stated by the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Aetna Life Insurance Company vs. Quarles*, 92 Fed. (2d), 321:

17

"The Court will refuse a declaration where another Court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, *where a special statutory remedy has been provided,* or where another remedy will be more effective or appropriate under the circumstances."

(Emphasis supplied.)

From an examination of these authorities there can be no question but that remedy by declaratory judgment is not available as a substitute for a prescribed statutory procedure.

Procedure Prescribed by the Railway Labor Act.

Having determined the nature of the applicable rules of law, it remains to be established that the Railway Labor Act prescribed a definite procedure to be followed in this type of case. We shall therefore direct the Court's attention to the nature of the case involved, the organization and development of the administrative agency which has been set up to deal with these cases, and to the statutory provisions governing the review of the orders of that agency. We shall show that all of these form integral parts of a statutory scheme for the handling of a certain type of case, a scheme designed to preserve the public interest by insuring the continuance of the agencies of interstate commerce uninterrupted by labor controveries.

18

The Type of Case It has long been the policy of Congress to foster the development of collective bargaining between carriers and their employees as a means of avoiding labor disputes which might interrupt the functioning of the nation's railroads and inflict serious damage on the public. Disregarding some of the older attempts to accomplish this result, modern efforts along this line were begun with the enactment of the Transportation Act of 1920, and were continued by two later statutes—the Railway Labor Act of 1926 and the Railway Labor Act as amended in 1934. The last named statute is now in effect.

A reference to "collective bargaining" calls to mind a system whereby the employer and the selected representatives of the employees meet to negotiate a collective agreement fixing the wages and terms of employment of the employees as a group. This phase of collective bargaining is well understood. The execution of a collective agreement, however, is only the beginning—not the end of the collective bargaining process.

Such an agreement by its nature covers a large number of varied individuals and situations. If a collective agreement is made, therefore, there will inevitably arise controversies as to exactly how the agreement shall be applied in specific cases. Such controversies, while not as broad in scope as those relating to making or changing agreements, may nevertheless cause as grave disputes between the parties, and in the aggregate may as seriously threaten the disruption of the industry.

19

The Railway Labor Act of 1934 recognizes the existence of such disputes and the importance of providing a method for adjusting them. It provides this method in these words:

> "Section 3. First (i) The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."
>
> (Emphasis supplied.)

Therefore, the type of case for which Congress established the procedure provided in the Railway Labor Act is one involving disputes between carriers and employees growing out of grievances, or out of the interpretation or application of collective agreements.

We have pointed out above that the dispute between the plaintiff and the defendants in the present case is one growing out of the interpretation which the plaintiff has put upon the Collective Agreement of 1923. Accordingly there can be no question but that the case at hand is one of those with regard to which Congress saw fit to legislate.

20

Organization and Development of National Railroad Adjustment Board.

The statutory foundation for the National Railroad Adjustment Board is to be found in the various paragraphs of Section 3 of the Railway Labor Act. A summary of these provisions will probably be more helpful to the Court than detailed quotations from them. (For the provisions in question see Appendix I.)

In brief, this Board is a body composed of representatives selected by the carriers and by the national organizations of employees in *equal* numbers. The Board is divided into several divisions, the First Division being the only one with which we are concerned. This Division, whose jurisdiction is confined to disputes involving train and yard service employees, is composed of ten (10) members, five (5) of whom are selected by the carriers and five (5) by the five labor organizations whose members are engaged in train and yard service. Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail. The judge is learned in the law, but

21

must be informed by the parties as to the practical aspects of each case. A member of the Adjustment Board has probably only a layman's understanding of the law, but a wide practical knowledge of the field in which the tribunal operates. A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. "Compromise" judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created.

The organization of the Board may seem anomalous at first glance. The anomaly disappears, however, if it realized that the Adjustment Board takes as its pattern *not the courtroom but the conference table.* Its members are *representatives* or *advocates,* rather than arbiters. It is provided in the Railway Labor Act that any award of any Division of the Board must be concurred in by a majority of the members. If the regular members are unable to reach an agreement, a neutral referee is called in to sit and vote with them for the purpose of breaking the deadlock. (See Railway Labor Act (Section 3, First (1) in Appendix I.) If such referee is selected, the Board then adopts a quasi-judicial formula of procedure. The members then become adversaries indeed and actively urge their respective views upon the referee to whom their differences are, in effect, submitted for decision.

22

That Congress chose to establish the National Railroad Adjustment Board according to this exact pattern is made clear by the terms of the Railway Labor Act. The selection of this pattern was not made as a matter of chance or whim. The Adjustment Board was organized as it was because long years of successful experience had revealed this sort of organization as the one most likely to accomplish the Congressional purpose of establishing industrial peace on the railroads.

Both employers and employees who desire harmonious labor relations have long been aware of the advantages offered by the conference room. A conference between the employee who has a grievance, and his immediate supervisor *may* bring a ready adjustment of the matter. Too often, however, the attitudes of the direct participants are warped by prejudices and predelections of a personal or local nature. The conference is more likely to succeed if held between *representatives* of the parties, just as attorneys can often arrange settlements of legal actions when their clients cannot.

If an adjustment is not reached in conference on the property between local representatives of the persons who are involved in the dispute, the next logical step is to submit the controversy to a conference off the property, between representatives selected by the carriers generally and by employees generally—or in other words, to an adjustment board.

While local or system adjustment boards have been employed for a long time as a means of settling disputes

between train service employees and the carriers, the first use of this procedure which was other than local in character, was embodied in a document known as the "Joint Settlement Awarded by the Committee of National Defense". This was the instrument which formally ended the "8-hour day" controversy during the World War. The "Settlement" which was dated March 19, 1917, contained the following provision:

> "It is further agreed that if any differences arise over the application of the foregoing award, they shall be referred to a standing Commission of Eight, four to be chosen by the National Conference Committee of Railways and four by the railroad brotherhoods. A majority decision to be binding."

The said "Commission of Eight" was duly selected as provided, and applied the settlement awarded by the Council of National Defense to approximately 225 railroads involving nearly 900 agreements and in doing so was required to make approximately 30,000 decisions. While the Commission of Eight was made up of an equal number of representatives of the employees and the railroads, it disagreed on only 3 cases; that is, there were only three matters submitted to the Commission upon which agreements were not reached.

On March 22, 1918, the Federal Director-General of Railroads issued his General Order No. 13, which approved and made effective a memorandum of understanding between the Regional Directors of the railroads and the executive officers of the Train Service Labor

24

organizations. This order established a tribunal known as Railway Board of Adjustment No. 1, which was to adjust disputes growing out of the interpretation and application of agreements concerning rates of pay, rules and working conditions of train service employees. A copy of a portion of this memorandum is attached to this brief as Appendix II. An examination of certain portions which we have italicized in the Appendix will reveal that the National Railway Labor Act borrowed freely from its phraseology.

This order was followed by General Order No. 29 (May 31, 1918) and General Order No. 53 (November 13, 1918) which provided similarly for Railway Boards of Adjustment Nos. 2 and 3, which were to have jurisdiction respectively over disputes involving shopcraft employees and disputes involving telegraphers, switchmen, clerks and maintenance-of-way employees.

During the period of Federal control, Railway Board of Adjustment No. 1 decided 3,000 cases without an appeal; Board No. 2 decided 2,000 cases with less than 10 appeals; and Board No. 3 decided 1,100 cases with only one appeal.

The following excerpt from the Report to the President by Walker D. Hines, Director-General of Railroads, for the 14-months period ending March 1, 1920, indicates the character of service rendered by the Boards of Adjustment during the period of Federal control:

> "At the beginning of the Railroad Administration in 1918 the Division of Labor was created as

25

a division coordinate with the other divisions in the Railroad Administration and Mr. W. S. Carter, president of the Brotherhood of Locomotive Firemen and Enginemen, was appointed to the position of director of that division and has held it through the life of the Railroad Administration.

"One of the early steps taken and an exceedingly important step, was the creation of certain bi-partisan boards of adjustment to deal with grievances of employees which could not be settled on the railroads between the local managements and the representatives of the employees. The principle of collective bargaining was frankly recognized in the creation of these boards because they were created by agreement between the representatives of the railroad labor organizations on the one hand and the regional directors of the United States Railroad Administration on the other hand. The work of these boards of adjustment has been eminently satisfactory. Each board has been composed of an equal number of expert representatives of the management and expert representatives of the employees. With a full practical knowledge of the problems the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically very case.

"Various orders of the Director-General have established reasonable rules and working condi-

tions, which were applicable in the very numerous cases where no rules and working conditions had been established prior to Federal control, and in some cases the rules and working conditions established by the Director-General have, by agreement, become a substitute for those which prevailed by agreement prior to Federal control.

"As a result of these defined working conditions and these boards of adjustment, the employees generally have felt that they were much better protected than formerly against arbitrary action.

"Naturally such a system requires time for it to be fully understood and successfully carried out by the vast number of local officials who are responsible for discipline and by the local labor representatives who with the local officials deal with grievances. Inevitably at first the new system had the effect in many instances of raising a question as to the authority of the local officials and caused some discouragement on the part of some of them and some misconception of the situation on the part of some employees. Nevertheless, the system has fully justified itself, and it is only a question of time and mutual understanding when local incidents of a discouraging character will disappear.

"It is an interesting commentary that on some of the largest railroads in the country, with the strongest and most effective managements, not a single case has come to one or more of these boards of adjustment. The local managements have dealt with the classes of employees repre-

sented on such board or boards so reasonably as to obviate the necessity for appealing thereto any grievances at all, and the committees representing the employees have adopted a reasonable attitude and avoided appeals to the Boards of Adjustment. Eventually this same successful treatment should be manifest on all the railroads and as to all classes of employees, if the system shall be maintained in some proper form."

These various Railway Adjustment Boards were dissolved in 1920 inasmuch as the period of Federal control of railroads was then terminated by the Transportation Act of that year. Title III of this statute contained certain provisions designed to stabilize labor relations on the railroads. The device of Adjustment Boards was retained, although their establishment was made voluntary and not compulsory. Their jurisdiction was limited to disputes "involving only grievances, rules or working conditions", which is similar to the jurisdictional limit of the present Adjustment Board.[1]

Under this Act there were organized what were known as "Regional Train Service Boards of Adjustment"; one was established for the Southeastern Region on May 31, 1921; for the Western Region on August 25, 1921; and for the Eastern Region on November 9, 1921. The agreements setting up these boards were all sub-

[1] For the ready reference of the Court we reproduce here a portion of the Transportation Act of 1920:

"Sec. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and

stantially the same. Excerpts from that establishing the Southeastern Regional Board are reproduced as Appendix III hereof. As in the case of General Order 13 and the memorandum incorporated, the phraseology will be found to be similar to that used in the present Railway Labor Act.

The United States Railroad Labor Board which is referred to in the agreement above mentioned as an appellate tribunal to which disputes could be referred in the event that the regional board could not agree upon an award was created by the provisions of the Transportation Act of 1920. It consisted of nine members, all appointed by the President, with the advice and consent of the Senate. Three members, however, were appointed from nominees submitted by the carriers and three from those submitted by the employees. This Board had jurisdiction of (1) disputes relating to wages (which, as we have seen above, were not within the jurisdiction of the Adjustment Boards), and (2) disputes where the

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the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provision of this title is authorized to hear and decide such dispute (41 Stat. L. 469).

Sec. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof (41 Stat. L. 469).

Sec. 303. Each such Adjustment Board shall * * * receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board (41 Stat. L. 469)."

29

Adjustment Boards had jurisdiction but had found themselves unable to agree.[1]

This Board functioned with fair success for several years until it was held that its orders lack legal sanction (*Penn. R. R. Co. vs. U. S. Railway Labor Board*, 261 U. S. 72; *Penna. System, etc. vs. Penna. R. R. Co.*, 267 U. S. 203). After the decisions in the above cited cases the Board lost much of its influence. Consequently the whole situation under the Transportation Act became so unsatisfactory that the carriers and employees joined in asking Congress to repeal Title III of this Statute, and to enact in its stead a new statute, the Railway Labor Act of 1926.

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[1] We copy here further relevant provisions of the Transportation Act:

"Sec. 304. There is hereby established a board to be known as the 'Railroad Labor Board' and to be composed of nine members as follows:

(1) Three members constituting the labor group representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; (2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and (3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate. Any vacancy on the Labor Board shall be filled in the same manner as the original appointment. * * * (41 St. L. 470)

"Sec. 307 (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. * * * (41 St. L. 470)

30

This latter Act also considered that the best available means of adjusting disputes growing out of grievances, or out of the interpretation or application of collective agreements was afforded by the now familiar device of Adjustment Boards. It therefore continued the pre-existing policy of the Government in this regard.[1]

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[1] The following excerpts are from the Railway Labor Act of 1926:

"Sec. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.

"The agreement—

"(a) Shall be in writing;

"(b) Shall state the group or groups of employees covered by such adjustment board;

"(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

"(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

"(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

"(f) Shall state the number of representatives of the employees and the number of representativs of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

"(g) Shall provide for the method of selecting members and filling vacancies;

"(h) Shall provide for the portion of expenses to be assumed by the respective parties;

"(i) Shall stipulate that a majority of the adjustment board members shall be competent to make an award, unless otherwise mutually agreed;

31

The United States Railroad Labor Board was abolished by the Railway Labor Act of 1926, and there was established instead a board known as the National Board of Mediation, whose functions were quite different from those of its predecessor. The new Board had no power to decide any dispute or to make any order enforceable or otherwise. Its sole authority was to attempt to bring the parties into agreement by mediation.

After the enactment of the Railway Labor Act there was established by agreement a fourth train service board of adjustment; this one having jurisdiction over the Southwestern Region. In addition some system boards were created whose authority extended only to the system involved. Many carriers, however, refused either to become parties to the agreements establishing regional boards, or to agree to establish system boards. Thus the boards of adjustment which were established and did function under the Railway Labor Act of 1926 covered only a portion of the nation's railroad system.

In addition, however, the Act provided no effective method of handling cases to a conclusion where the members of the board disagreed, and a deadlock resulted. Of course, no appeal could be taken to the United States Railroad Labor Board for that body had been abolished,

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"(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and

"(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.

"Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

and in any event its decisions had lacked binding force. The experience of the National Board of Mediation in attempting to mediate disputes where the various adjustment boards had failed to agree was so unfortunate as to cause it to become reluctant to take jurisdiction.

Even with these handicaps, however, the Regional Boards of Adjustment had disposed of the following numbers of cases prior to June 21, 1934:

Western Board	6,013
Eastern Board	1,408
Southeastern Board	1,140
Southwestern Board	808
Total	9,369

The reverse of the picture is shown by the fact that prior to the date mentioned, the Western Board had deadlocked and released jurisdiction over 374 cases which it had been unable to settle. The Eastern Board had deadlocked in 24 cases. No statistics are available as to the situation regarding the other two Regional Boards, or any system boards which may have been operating, but the number of deadlocked cases is known to have been large.[1]

The existence of this whole situation prompted Congress to give further consideration to the problem, and

[1] It must be remembered that the statistics given above are only for those boards of adjustment effecting train service employees. In the case of the other seventeen crafts or classes of railroad employees where, if adjustment boards existed at all, they were system rather than region boards, the number of deadlocked cases was staggering, although no exact statement is possible.

on June 21, 1934, there was enacted the Amended Railway Labor Act. This statute further continues the established Federal policy. Opportunity is still freely given to any carrier or group of carriers and its or their employees to establish or maintain system or regional adjustment boards.[2]

In case such boards are not desired, however, provision is made for the National Railroad Adjustment Board, a tribunal the scope of whose operations is nation wide. It is provided that the Board and its various divisions are to be organized on the now familiar bi-partisan plan. The only material change in organization was made by providing that in the event the Board is unable to agree, a non-partisan referee shall be selected to sit with the members and with them decide the case.

In addition to this deviation from the typical, in the matter of organization, the statute expressly makes orders of the Board "final and binding upon both par-

[2] Section 3. Second of the Act provides as follows:
"Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

ties to the dispute except insofar as they shall contain a money award."[1]

From other sections of the Act, however, it is apparent that the "finality" given to the awards of the Board is an administrative finality only. There is no intention of attempting to preclude a judicial review. There is no power given to the board to enforce its orders. Both review and enforcement are provided for in Section 3, First (p), which reads as follows:

> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts

[1] "Section Three. First. (m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The District Courts are empowered, under the rules of the Court governing actions at law, to make such order and enter such judgment by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

The provisions of this paragraph are almost identical with the provisions of the Interstate Commerce Act relating to the enforcement and review of reparations orders of the Interstate Commerce Commission, and are also virtually identical with the provisions of the Packers and Stockyards Act relating to the enforcement and review of similar orders of the Secretary of Agriculture. The similarity of language is so striking as to lead to the conclusion that the provisions of the Railway Labor Act were copied from the other two statutes mentioned, and were designed to have similar legal consequences. Those provisions of the Interstate Commerce Act and of the Packers and Stockyards Act which are relevant in this connection are set forth in Appendix IV of this brief.

We do not understand that any question is being raised in this case as to the constitutional adequacy of

the prescribed method of review of the Adjustment Boards' decision. Indeed this question is no longer open in view of the decisions of the Courts upholding the constitutionality of the similar provisions of the Interstate Commerce Act and of the Packers and Stockyards Act. (See *Meeker vs. Leigh Valley R. R. Co.*, 236 U. S. 412; *Southern Ry. Co. vs. Eichler*, 56 Fed. (2d) 1010, and *Sullivan vs. Union Stockyards Co.*, 26 Fed. (2d) 60.) For the purposes of this case, therefore, we can assume the constitutionality of these provisions for review.

From all of the foregoing discussion certain factors stand out clearly:

First—Congress was faced with the necessity of providing a means for settling disputes between carriers and employees arising out of grievances, or out of the interpretation or application of collective agreements.

Second—In seeking a means of accomplishing the purpose of adjusting such disputes Congress turned to an already proven administrative device—that of adjustment boards.

Third—In the event that a carrier might consider the order of the Board to be in violation of its legal rights, it seemed to Congress both just and necessary to provide a method for judicial review of such orders.

The review process adopted was not the result of a haphazard selection, but forms an integral part of the whole Congressional plan. That plan, as we have seen, has its cardinal principal that the parties should be given every inducement to agree upon a practicable set-

37

tlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No *legal* compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees. Suit may be brought at any time within two years, thus affording ample opportunity for adjustment by agreement. If at the end of two years no action is brought the employees lose their right to file suit to enforce.

It is conceded that the option to bring or not bring suit is left in the hands of the employees. There is nothing illogical or unjust about this fact. After all, if an order of the Board is to be applied, the application must be made *by the carrier* as it, and it alone, has control over operating practices. If legal compulsion is sought, *it* is the only one upon whom that compulsion can be exercised. The situation is the same as that involved in reparations cases growing out of illegal rates for in such cases the only person who can make reparation is the one who has received the proceeds of the rates in question. The analogy between reparation and Adjustment Board cases is striking. It is not astonishing, therefore, to find the enforcement provisions of the Railway Labor Act in a large measure copied from other statutes relating to matters of reparation.

It is conceded, too, that Congress copied the provisions of the Interstate Commerce Act and of the Packers and Stockyards Act with the probable intent of mak-

ing resort to the Courts unattractive to the carriers. Certain advantages are given to the employees if and when the latter are compelled to take Court action. The choice of venue is theirs as the petitioner may sue "in the District Court of the United States for the district within which he resides, or in which is located the principal operating office of the carrier, or through which the carrier operates". Such a petitioner is not liable "for costs in the District Court, nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal". If the petitioner prevails he is to be allowed a "reasonable attorney's fee". (See Railway Labor Act, Sec. 3, First (p) copied in Appendix I.) These provisions obviously are designed to deprive the carrier of the practical advantages both geographical and financial, which it might otherwise enjoy in the defense of an action brought by one or more employees seeking to enforce a decision of the Adjustment Board.

Furthermore, it is provided in the Railway Labor Act that findings of fact made by the Board shall be accepted in the District Court as prima facie correct, a provision designed to shift the burden of proof in part at least, and thus deprive the carrier of certain of its procedural advantages as a defendant.

To recapitulate, the Congressional plan contemplates three factors:

(1) The necessity of providing a means for settling disputes arising out of the interpretation or application of collective agreements;

39

(2) The adoption of bi-partisan Adjustment Boards as the sort of tribunals best adapted to this purpose, and

(3) The provision of a method of judicial review which shall be correlated with the purposes of, and the administrative processes set up by, the Railway Labor Act.

The plaintiff in the present case is the carrier. It comes into Court shortly after the promulgation of an order of the National Railroad Adjustment Board, and asks for a declaratory judgment which, in effect, will amount to a judicial review of this order. It needs little argument to demonstrate that the granting of such a judgment would completely disrupt the process of judicial review contemplated by the statute.

In the first place, the statute gives a two-year interval, between the effective date of the order and the time when suit must be brought, if at all, a time interval intentionally interposed for the purpose of giving further opportunity for the settlement of the controversy by negotiation. The statutory provision and purpose will be completely nullified if the carrier may immediately seek the review of an order of the Board through a declaratory judgment.

The statute seeks to equalize certain practical disadvantages which an employee may be under in seeking an enforcement. Accordingly it is provided that he may (within limits) select the District Court in which suit is to be brought. If defeated, he is not to be liable for

cost, save on his appeal, and if he wins, he is to receive reasonable attorney's fees. These rights are his as a matter of statutory law. There is no provision in the Declaratory Judgments Act which requires or authorizes the granting of similar advantages to the employees in this action. The issuance of a declaratory judgment here will therefore effectively deprive the employees of their statutory rights.

Finally, the findings of fact of the National Railroad Adjustment Board are accorded the effect of prima facie evidence in the statutory method of review. In this action they would have no such effect. The granting of a declaratory judgment would therefore effectively rob the Board's findings of the effect accorded to them by law. This Court is being asked to disregard and nullify a Congressional statute and to substitute for the method of judicial review there provided another method completely foreign to the Congressional intent.

The granting of declaratory judgments in cases of this kind will not only achieve a nullification of those provisions of the Railway Labor Act designed to provide for the enforcement and review of Adjustment Board orders, but will in addition seriously interfere with the operations of the Board itself.

It must be apparent that the facts upon which the plaintiff chiefly relies to support its prayer for a declaratory judgment are not peculiar to the plaintiff's situation. In every case where an order and award of the National Railroad Adjustment Board have been is-

41

sued against a carrier, and the carrier does not comply, it finds itself in a position in all respects identical to that of the plaintiff here. In each of such cases the terms of a collective agreement have received an interpretation, an award has been made, an order has been issued directing the carrier to comply with the award, the employees insist upon compliance, and during the period intervening between the issuance of the order and the ultimate settlement of the dispute as a result of negotiations or suit, potential claims of employees based on the agreement as interpreted by the Board will accumulate. These features are common to every case.[1]

The point which we wish to bring home to the Court is that if the plaintiff is granted a declaratory judgment in this case there will be no basis for refusing to entertain a similar suit in any case where an order of the Board has been issued against any carrier. Not only would such a result completely eliminate from the law the review procedure provided therein, but it would have inequitable and undesirable effects upon the employees of the carriers generally and upon the Board itself.

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[1] It is of course true that the plaintiff in this action has alleged certain irregularities in the proceedings of the Board which would not necessarily be common to every action of this type. As we will point out in another section of the brief, however (on page 49), no court can have jurisdiction to declare an order of the Board invalid, without more, since such an order being unenforceable in itself, carries with it no threat of damage to the party against which it is directed. The only way whereby a plaintiff carrier could hope to state a cause of action would be to seek relief in addition to the mere invalidating of the Board's order, i. e., a reinterpretation of the Collective Agreement in question, and a declaration of rights thereunder. In every case such request would have to be based on the same general contentions, as pointed out in the text.

42

While either carriers or employees are free to take disputes before the National Railroad Adjustment Board, most, if not all, of the disputes which reach that tribunal are taken there either by ex parte action of the employees or by joint submissions of both parties prepared at the request of the employees. It is not difficult to understand why this should be so. The carrier's theory as to the proper interpretation or application of the agreement involved in any case is always the one which is being applied, for the carrier is the one which applies such an agreement. The carrier, therefore, would have nothing to gain by instituting a proceeding to test the propriety of a practice which is already in force, and with which it is in thorough agreement.

An examination of the terms of the Railway Labor Act will reveal that *no right of appeal is given to the employees if they lose their case before the Board.* Inasmuch as they are the parties who ordinarily invoke the services of the Board under that statute they are precluded from attacking the terms of the Act in this regard or from seeking any right to review under general rules of law.[1]

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[1] *Cf.* **Minds vs. Penna. R. R. Co.**, 237 Fed. 267, where the Court held that a shipper invoking the jurisdiction of the Interstate Commerce Commission to pass upon his reparations claims is finally concluded an adverse action of the Commission, and cannot thereafter resort to the courts. We have already called to the Court's attention the fact that the provisions for the enforcement and review of the orders of the Adjustment Board are the same as those provided for reparations orders of the Interstate Commerce Commission.

43

Thus under the statute the carrier already has an advantage before the Board. If it wins, the decision in its favor is final; if it loses, the decision against it is interlocutory only, and it may still test out its legal rights in Court action which must be brought against it by the employees if the decision is to be enforced. The procedural and evidentiary disadvantages which the Act places upon the carrier in such an action are merely compensation for the advantages it enjoys before the Board.

If the practice is established of entertaining suits by carriers for declaratory judgments immediately after the entering of an order of the Board, the carriers will have a tremendous additional advantage. If a carrier wins before the Board, the result will not even be interlocutory, but will be an absolute nullity, for the carrier can immediately invoke the jurisdiction of the courts to retry the whole controversy de novo without even subjecting itself to the procedural disadvantages imposed upon it by the Act. Under such a system the employees would go before the Board with everything to lose and absolutely nothing to gain. It can hardly be doubted that the result would be an increasing unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes. Thus the Board's usefulness as an administrative agency would to a large measure be ended.

44

We desire that the Court should know the practical operation of the system provided by the Railway Labor Act for the adjustment of disputes—a system which the Court is being asked to disrupt. In the Fourth Annual Report of the National Mediation Board on page 5 we find this statement: "There were no instances during the course of the year (June 30, 1937, to June 30, 1938) on the railroads and air lines of employees leaving the service for strike purposes." This is a relatively calm statement of the startling and significant fact that *not a single employee of any American Railroad lost a single hour's time during the year mentioned on account of a strike.* We confidently assert that this is a record which cannot even be approached by any other American industry. The part played by the National Railroad Adjustment Board in achieving this result is shown by the statistics in its report attached as an appendix to the Report of the National Mediation Board above mentioned. From this report it appears that during the year in question the Board adjusted more than 1,600 *separate disputes,* thereby eliminating 1,600 *potential sources of labor strife.* Whatever may be said of the system provided by the Railway Labor Act, the inescapable fact is that *it works.*

In summary, therefore, in this connection, the rule of law is clear to the effect that a declaratory judgment will not be granted as a substitute for a procedure prescribed by statute for the type of case in question. It is equally clear that the plaintiff proposes just such a

substitution of remedies; a substitution whose inevitable effect will be the complete disruption of the whole procedure of the Railway Labor Act, a procedure which was instituted to accomplish, and which *is accomplishing*, a vital public purpose. Certainly the Declaratory Judgments Act was not designed as a means to provide for the bringing about of such results.

II. A Declaratory Judgment Will Not Be Granted as a Means of Reviewing the Decision of Another Tribunal.

The Declaratory Judgments Act is not an appellate statute. Its purpose is to provide a forum for the adjudication of controversies which otherwise could not be passed upon at the time when the action is brought. It is not designed to provide a new means for the redecision of *decided issues* where another forum is open and its processes have already been employed.

The Federal Declaratory Judgments Act (U. S. C. Title 28, Article 400, Paragraph I) provides that:

> "In cases of *actual controversy* * * * the courts of the United States shall have power * * * to declare rights and other legal relations * * *".

Where the statute refers to "actual controversy" it obviously refers to untried controversies, not those upon which decisions have already been rendered.

This position is supported by abundant authority. Professor Borchard in his work on Declaratory Judgments, page 181, states:

46

"The declaratory action is not a substitute for a new trial, or an appeal from a former judgment deciding identical issues, or issues which the court believes were passed upon."

In American Jurisprudence, Vol. 16, pages 295 and 296 in the article on Declaratory Judgments, we find the following:

"Questions already adjudicated by a court having jurisdiction of the subject matter and the parties cannot thereafter be the subject, between such parties and their privies, of an actual controversy within the meaning of this term in the Declaratory Judgments Act. The act is not intended to be used to elucidate or interpret judicial decrees or judgments already entered or to modify or declare rights thereunder. Hence, a declaratory judgment proceeding is not an appropriate method of obtaining the vacation of a judgment; and it would be entirely beyond the purpose and scope of the statute as well as contrary to fundamental principles for a court to attempt, in such a proceeding, to review and determine the validity of a judgment of a court of coordinate jurisdiction."

The Court of Appeals of the State of Kentucky had this problem before it in the case of *Back's Guardian vs. Bardo*, 234 Ky. 211; 27 S. W. (2d), 260, decided in 1930. An action had been filed by an Executor to sell certain real estate, to secure an order construing a will and for partition, in which action a judgment had been rendered granting the relief prayed for. Subsequently, some doubt

47

was expressed as to the regularity of the proceedings in the action above mentioned, and this suit was brought under the Declaratory Judgments Act propounding to the Court certain questions relating to the "construction of the will and the regularity of the partition proceedings in the prior action brought for that purpose, and to the proper distribution of the estate". The Court refused the relief requested and made the following statement:

> "Were we to hold that a proceeding under the Declaratory Judgments Act would lie for the purpose of determining whether a prior judgment in an action or proceeding between the same parties was proper, or the proceedings leading up to the judgment were regular, it would result in ignoring the prior judgment and in depriving the parties of the right of appeal within the time prescribed by the Code. *The purpose of the Declaratory Judgments Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated.* In other words, it was never intended as a *substitute for a new trial,* or other steps that the Code requires to be taken in the same action, or for *an appeal to this Court.* In the circumstances, the Court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties."
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> (Emphasis supplied.)

See also *Ferree vs. Ferree,* 273 Ky. 238, 115 S. W. (2d) 1055, and *Grooms vs. Grooms,* 225 Ky. 228, 7 S. W. (2d) 863.

48

In the case of *Kings County Trust Company vs. Melville,* 216 N. Y. Supp. 278, the Court held that the Declaratory Judgments Statute of New York did not confer jurisdiction upon a court to adjudicate a controversy already passed upon by a court of concurrent jurisdiction. This was considered as "in effect" asking the Court "to act in the capacity of an appellate court". The Court held that such procedure is contrary to fundamental principles, and is entirely beyond the purpose and scope of the provision authorizing declaratory judgments.

See also:

The same effect *Haan vs. Haan,* 231 N. Y. Sup., page 58.

In the case of *Central High School Athletic Association vs. City of Grand Rapids,* 274 Mich. 147, 264 N. W. 322, the Court declined to issue a declaratory judgment overturning a decision of the City Zoning Commission, whose decisions on the facts were made final by the ordinance.

It is thus established that where a controversy has once been decided by a tribunal having jurisdiction over it, it can no longer be considered a pending or "actual" controversy within the meaning of the Declaratory Judgments Act, whether the tribunal exercising original jurisdiction was administrative or judicial. It is, of course, true that while a decision of the National Railroad Adjustment Board is made "final" by statute, the order of the Board is not directly enforceable by process. This fact, however, does not militate against the opera-

tion of the above stated rule of law. The order of the Board, while not enforceable as such, still embodies a *decision* regarding the positions of the parties. Such an order might itself be termed a declaratory judgment of the Board, depending for its ultimate enforcement upon its being maintained in a court of law.

As we have seen, the purpose of the Declaratory Judgments Act is to provide a means whereby, in cases of actual controversy, a party who is in honest doubt as to his rights may have them adjudicated before committing overt acts which might result in the violation of the rights of others and in the imposition upon him of a liability for damages. In the present case there is no basis for any real uncertainty on the part of the plaintiff. Its rights and those of the defendants have already been established by a tribunal having statutory jurisdiction to decide them. Any uncertainty which may exist in the mind of the plaintiff is self-created. It arises, not out of the absence of a decision on the question, but out of its own unwillingness to accept and apply a decision already made. The Declaratory Judgments Act was not intended to afford relief in such circumstances.

III. A Declaratory Judgment Passing Upon the Validity of an Administrative Order Will Not Be Granted Where the Plaintiff is Not Imperiled by the Order.

In the foregoing sections of this brief we have established that the Declaratory Judgments Act does not provide a means for the review of a decision made by

50

another tribunal, and in particular that the Act cannot be invoked as a substitute for procedure specifically established by statute for the case at hand. There is yet another reason, however, why this Court is without jurisdiction to declare the order of the Board invalid through a declaratory judgment. This reason grows out of the fact that there is inherent in the order no threat of damage to the plaintiff.

That a contract, statute or other subject matter of an action must actively imperil the plaintiff before he can seek relief through declaratory judgment is well established.

> ". . The law created no new substantive rights or legal relationships but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties. Though such relief was inherent in some situations previously, the statute extended the propriety of the procedure greatly, with the obvious intent to avoid delay and *accrual of damages* against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued."
>
> *Davis* v. *American Foundry Equipment Co.*, 94 Fed. (2d) 441.
>
> (Emphasis supplied.)

"It was the congressional intent to avoid accrual of avoidable *damages* to one not certain of

51

his rights and to afford him an early adjudication without waiting until his adversary would see fit to begin suit, after damage had accrued."

E. Edelmann & Co. v. Triple-A Specialty Co., 88 Fed. (2d) 852.

(Emphasis supplied.)

With what damage is the plaintiff threatened by the Board's order? In other words, what justiciable controversy as to the validity of the order is presented by the complaint?

It is true that in Paragraph 4 of the complaint the plaintiff alleges in terms that "an actual controversy exists * * * said controversy having resulted from a purported award of the National Railroad Adjustment Board, First Division". This statement, however, must be considered in connection with the other allegations of the complaint, and when so considered it is apparent that it is a mere conclusion of the pleader not supported by allegations of fact, and hence not admitted to be true for the purposes of this phase of this proceeding. In order to establish the correctness of the last assertion, it is but necessary to turn to the complaint and examine it in order to ascertain the nature of the peril or threat of damages which the plaintiff alleges as the basis of its action. That peril arises solely out of the various claims for compensation made by the various defendants (see Paragraph 29 of the complaint, page 10). These claims, however, are *based upon the Agreement of* 1923 *—not upon the order of the Board.*

52

It is true that the Agreement in question was interpreted by the order of the Board in accordance with the contentions of the defendants as to its meaning. Their present claims, however, are not based upon the order because the order is in itself *unenforceable*. It may be "enforced", if at all, only through a court action. An examination of the "enforcement" provisions of the Railway Labor Act will reveal fully the legal effect of the order of the Board. We have already considered these provisions in another connection, and have noted that the only legal effects attached to an order of the Board, when before a court for enforcement, are evidentiary or procedural effects—not substantive ones; e. g., findings of fact contained therein are prima facie correct. The existence of the order is also important in fixing costs and attorneys' fees. Otherwise than as above noted, an action to "enforce" an order of the Adjustment Board proceeds exactly as if there were no order. The plaintiff files "a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises". The action proceeds "in all respects as other civil suits" (with the exceptions above noted) and the Court enters "such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board". (Quotations are from Section 3, p. of the Railway Labor Act, see Appendix I.)

53

Although the statute speaks of the action as one to enforce an order of the Board, and although the procurring of such an order is undoubtedly a prerequisite to the use of the statutory procedure, it is apparent that the mere existence of the order in no sense establishes that the plaintiff in such a suit has a cause of action. He must plead more than the order. He must prove more, and a judgment of enforcement by no means follows as a matter of course from the order's issuance. His cause of action before the Court is dependent upon the agreement, out of the interpretation of which, the alleged dispute arose. The existence of the order of the Board merely assists him in preparing and proving that cause of action.

It follows, therefore, that when the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable.

Accordingly the plaintiff has failed to show how the existence of the Board's order effects its legal rights in any way. The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued. If this Court should, without more, grant a declaratory judgment holding the order of the Board invalid, the plaintiff would still be in the same position in this regard.

The fact that persons have presented claims of right under an agreement might, in a proper case, have con-

siderable bearing on the question as to whether the Court should by declaration interpret that agreement, but it cannot afford justification to the Court to interpret any and all other documents, orders, etc., which may in some manner be connected with the subject matter. The collective agreement of 1923, and the order of the National Railroad Adjustment Board are two separate and distinct entities. The fact that uncertainty or peril may arise from one cannot empower the Court to make a declaration as to the other.

Plaintiff has failed to show that there exists any claim against it, based on the order of the Board, or that there exists any uncertainty as to its rights under that order (for the reason that the order establishes no rights). It follows that as to this item of relief the plaintiff has failed to bring itself within the purview of the Declaratory Judgments Act.

IV. The Railway Labor Act Does Not Vest Judicial Power in The National Railroad Adjustment Board.

The plaintiff asserts that the Railway Labor Act seeks to vest judicial power in the National Railroad Adjustment Board, an administrative agency, and that hence both the statute and the order of the Board made thereunder are invalid.

Article III, Section 1 of the Constitution of the United States, provides that "the judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time

55

to time ordain and establish". A number of courts and commentators have sought to state general definitions of this phrase and of kindred expressions. Thus in Volume 14 of American Jurisprudence, page 364, we find the following statement:

> "Judicial power is that which adjudicates upon and protects the rights and interests of individual citizens and to that end construes and applies the law. It means power to hear, to determine, and to enforce. It has also been defined as the power to entertain a suit, consider the merits—that is, the various elements which enter into and qualify the plaintiff's rights to the relief sought—and render a binding decision thereon."

In discussing the "jurisdiction" of the Federal Courts under Article III the Supreme Court of the United States stated in an early case:

> "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the Court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."
>
> *The State of Rhode Island v. the State of Massachusetts*, 12 Peters (U. S.) page 657 at 718.

56

See further in this connection, *General Investment Company v. New York Central Railroad Company*, 271 U. S. 228 at page 230.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought."

In distinguishing between the legislative and judicial functions of the Government, the Supreme Court stated in the case of *Prentis v. Atlantic Coast Line Company*, 211 U. S. page 210, at page 226, that:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."

The Supreme Court of Arizona in the case of *Stuart v. Norviel*, 26 Ariz. 493, has said:

> "Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."

Authorities might be multiplied along these lines, but we believe that enough has been said to establish that in general judicial power includes, first, the power to pass upon issues in controversy, and, second, the power to render a binding judgment in relation thereto.

It is at once apparent that as to the second of these qualifications the power of the National Railroad Adjustment Board is certainly not judicial, inasmuch as

57

its orders lack binding effect and cannot be "enforced", save through a regular action in the courts. The situation in regard to the orders of this Board is strikingly similar to that considered by the Supreme Court of Montana in the case of *Shea v. North-Butte Mining Company*, 55 Mont. 522, 179 Pac. 499. In this case the Court was confronted by the contention that the Workmen's Compensation Act of the state vested judicial power in the Industrial Accident Board. The Court rejected this contention saying:

> "It is true that many of the functions exercised by the Board are judicial in character; but that it is not vested with judicial power in the sense in which that expression is used in the Constitution becomes clear upon a moment's consideration. As used in the Constitution, the expression 'judicial power' means the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Miller on the Constitution, 314. This power the Board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but *it is without power to render an enforceable judgment*, and its determinations and awards are not enforceable by execution or by other process *until a judgment has been entered therein on appeal to a regularly constituted court.*"
>
> (Emphasis supplied.)

58

In a case involving a similar statute the Supreme Court of the State of Missouri in the case of *Oren v. Swift & Company*, 51 S. W. (2d) 59, said:

> "We do not consider the Commission a Court, and we have held that the Compensation Act does not vest it with judicial power in a constitutional sense (citations omitted). It has no power to authoritatively expound any principle of law or equity, or to *enforce its orders. Its awards are not enforceable by execution or other process until judgment is entered thereon in the Circuit Court.*"
>
> (Emphasis supplied.)

Thus it is apparent at the outset that one of the essential attributes of "judicial power", i.e., the authority to render a binding judgment or decree, is not possessed by the national Railroad Adjustment Board.

Referring back, however, to the first of the indicia of "judicial power" above noted, i. e., "the power to pass upon issues in controversy", it is clear that here is a broad statement of the law which, while in the main correct, cannot be considered as controlling in every situation. While judicial power is undoubtedly the power to pass upon issues in controversy, it by no means follows that every power to pass upon such issues must necessarily be held to be "judicial" within the meaning of the Constitution. There are many instances where such power has been vested in administrative agencies without violating the constitutional restriction.

59

"Many, if not most, executive and administrative officers are called upon to make determination of facts in the performance of their official duties, and to apply the law as they construe it to the facts so found. In so doing they do not exercise 'judicial power', as that phrase is used in the Federal Constitution and laws."

Tracy v. Commissioner of Internal Revenue, 53 Fed. (2d) 575 at page 578.

We do not understand that the plaintiff questions this practice so long as the issues involved arise between a private party and some agency of government. It is contended, however, that where two private parties are involved in a controversy relative to their present rights and duties the power to decide that controversy is necessarily a judicial power which may be vested only in the Courts (See paragraph 31 (d) of the complaint, page 11).

The plaintiff's contention in this regard is too broad, however, and fails to find support in the authorities. While it must be concluded that the decision of controversies between private citizens is ordinarily the function of the Courts, it is well recognized that the power to render such decisions may be vested in administrative bodies where, (1) cases of the type in question will probably be so numerous as to over-burden the judicial system, or are otherwise of such a nature as to be inappropriate for decision by judicial procedure, and (2) the decision of pending issues between parties is incidental

to a larger purpose, legislative or administrative in nature.

The first of these exceptions includes cases under the Workmen's Compensation Acts. These Acts ordinarily confer upon administrative agencies jurisdiction to pass upon all questions arising under the statutes, whether of fact or of law. Where a self-insurer is involved, the case is one between private parties, yet the Courts have concluded that there is no vesting of judicial power in an administrative agency such as to violate the constitutional provisions.

Alabam's Freight Co. v. Hunt, 29 Ariz. 491.

Oren v. Swift & Co., supra.

Shea v. North-Butte Mining Co., supra.

Wheeling Corrugating Co. v. McManigal, 41 Fed. (2d) 593.

Crowell v. Benson, 285 U. S. 22.

In the case last above cited the Supreme Court of the United States said:

> "For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus *relieving the courts of a most serious burden* while preserving their complete authority to insure the proper application of the law."
>
> (Emphasis supplied.)

In this connection we direct the Court's attention to the annual reports of the National Railroad Adjust-

ment Board attached as appendices to the annual reports of the National Mediation Board. It appears from these reports that there have been docketed with the National Railroad Adjustment Board during the period beginning at its establishment and ending on June 30, 1938, a total of 7,109 cases; 3,891 cases have been heard and 4,247 cases decided. Of this total the First Division alone has docketed 6,080 cases, has heard 3,078 and has decided 3,329. If it should be held that all of these cases are of such a nature that they are fitted only for determination by the courts, it is apparent that the judiciary would be under an insuperable burden of litigation.

Furthermore, the Courts have sanctioned the submission of controversies between private parties to administrative bodies where the making of the decision is incident to and in furtherance of a broad legislative plan. Reparations cases are in this category. Where an unreasonable or discriminatory rate has been charged a shipper he may "sue" the carrier for reparation before the Interstate Commerce Commission. Such an action is between private parties and the issues raised are essentially the same as would be present in an ordinary action for damages.

Yet it has been held that the decision of individual controversies involving reparations is only an incident of the Commission's administrative function to provide for reasonable and uniform rates in the future. Accordingly no "judicial power" is said to be vested in the Commission.

62

In the case of *Southern Railway Company* v. *Eichler*, 56 Fed. (2d) 1010, a reparations proceeding before the Commission turned on the interpretation to be given to a tariff published by the carrier. The carrier contended that such an issue was outside the jurisdiction of the Commission. The Court rejected this contention, saying:

> "In this view, the question at issue resolved itself into one of law, requiring the construction of a tariff, and appellant urges that this is a question for the Court alone, and not one within the jurisdiction of an administrative body. While it may freely be admitted that the submission of pure questions of law, to a body in which the rules of evidence are relaxed, and the hearing assumes an informal character, must necessarily be less satisfactory, nevertheless, the jurisdiction of the Commission to entertain the complaint of any person claiming to be damaged by any common carrier subject to liability under the provisions of the Interstate Commerce Act has been broadly conferred by the Congress (Section 9, 49 USCA p. 328), and this jurisdiction has been consistently recognized.
>
> (Citations omitted.)
>
> "If an order for reparation is made by the Commission, it can be enforced only by suit in some court of general jurisdiction. Section 16, 49 USCA p. 6. Thus the constitutional provisions guaranteeing trial by jury and due process of law (Const. U. S. Amendments 7 and 14) are satisfied."

63

The same conclusion has been reached regarding a reparations order of the Secretary of Agriculture made pursuant to the provisions of the Packers and Stockyards Act. The case of *Sullivan* v. *Union Stockyards Company*, 26 Fed. (2d) 60, involved the question of whether preliminary resort must be had to the administrative agency as a prerequisite to court action. The precise issue adjudicated is shown from the following excerpt from the opinion of the Court:

> "The Packers and Stockyards Act is patterned upon the Act to Regulate Commerce, and the plaintiff concedes the applicability to this case of the rule recognized by this Court in *Chicago, B. & Q. R. Co. v. Merriam & Millard Co.*, 297 F. 1, and *Famechon Co. v. Northern Pacific R. Co.*, 23 F. (2d) 307, to the effect that, in cases arising under that Act, preliminary resort must first be had to the Interstate Commerce Commission, and the right to reparation fixed, before suit may may be successfully maintained in the courts.
>
> "It is claimed, however, that such an interpretation of the Packers and Stockyards Act and of the Act to Regulate Commerce renders them unconstitutional, because it gives to the Secretary of Agriculture, in the one instance, and to the Interstate Commerce Commission, in the other, judicial powers. No case is cited in the plaintiff's brief which has any bearing on the specific question. He refers to the general proposition that executive, legislative and judicial functions shall be kept separate, and that persons intrusted with power in any one of these three branches shall

not be permitted to encroach upon the powers confided to others. About this, of course, there is no dispute. He cites *Interstate Commerce Comm. v. Brimson,* 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047, in which it was held that the Commission could not be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment, on the ground that 'the power to impose fines or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises'. There is a vast and obvious distinction between the power to order a man to jail and the power to determine from evidence whether a right to reparation exists because of a discriminatory charge.

"That the Interstate Commerce Commission possesses certain quasi judicial power has long been recognized by the Supreme Court, without perturbation."

The Court decided the case as follows:

"An order of the Secretary of Agriculture, determining that a rate is unreasonable or discriminatory and awarding reparation, is a quasi judicial order."

A consideration of the provisions of the Railway Labor Act as a whole will show that the jurisdiction conferred upon the National Railroad Adjustment Board was not so conferred for the purpose of segregating a certain type of cases merely in order to provide a separate form for their determination. The segregation is

65

a part of a legislative plan designed to operate in the future in the insuring of a condition of industrial peace on the railroads.

In an earlier portion of this brief we have already sketched for the Court the organization and history of the National Railroad Adjustment Board. We have seen that its legal antecedents were all administrative rather than judicial in character. We have seen that its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it.

In short, the National Railroad Adjustment Board was formed to further a legislative purpose. This fact is clearly revealed by the provisions of the Railway Labor Act and the reasons stated by Congress for the adoption of this statute. In the first place, referring again to the provisions of Section 3, Paragraph First (i) (quoted in Appendix I hereof) we find that the cases coming before the tribunal are "*disputes* * * * *growing out of* grievances, or out of the interpretation or application of agreements * * * ". The exact language of the statute is important in this connection as is also the reason for its adoption.

Both parties to a collective agreement participate in its execution. Only one of them, however, the employer, is primarily responsible for its interpretation or application. This conclusion arises out of the control of operating policies which is necessarily in the em-

ployer's hands. In the carrying out of that control it must necessarily, in the first instance, interpret and apply its collective agreement with its employees. If the interpretation or application so made is unsatisfactory to the employees, a dispute arises. Such a dispute, if not adjusted by the parties, may eventually find its way to the National Railroad Adjustment Board. Thus, it will be seen that the subject matter upon which the Board is called to exercise its jurisdiction is the "dispute", not the "interpretation" of the agreement. The "interpretation" to which the statute refers was the one *made by the carrier* and was the act which *caused* the dispute. Under the words of the statute, therefore, the jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are

not conducive to the establishment of cordial relationships between the parties in the future.

In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.

That such is the purpose of the Railway Labor Act there can be no doubt. The language of the Act itself is unambiguous. The provisions of Section 3 give no direction to the National Railroad Adjustment Board as to the nature of its decision, save to say that it shall make an "award"—a word borrowed from the language of arbitration. Section 1 of the statute under the heading "General purposes" gives us further light as to the nature of the Board's decisions when it says: "The purposes of the Act are; * * * (5) To provide for the prompt and *orderly settlement* of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions".

68

That the intention of the framers of the Act was to provide a tribunal which would settle such disputes in a manner conducive to future peaceable relationships between the parties is shown by the language of the report of the Committee of the House of Representatives on Interstate and Foreign Commerce which was made at the time when the passage of this Act was recommended. The language of this report is as follows:

> "The *major purpose* of the bill is to provide *sufficient and effective* means for the settlement of minor disputes known as grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions * * *. Unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of *strike ballots* and *threatened to interrupt interstate commerce in order to secure an adjustment.* This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected *in the interests of industrial peace and of uninterrupted transportation service.* This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties."
>
> (Emphasis supplied.)

It will be remembered that the United States Railroad Labor Board, created by the Transportation Act

of 1920, possessed among its other powers jurisdiction to consider disputes growing out of grievances or out of the interpretation or application of agreements in the event that regional boards of adjustment were unable to agree upon awards. In characterizing the general jurisdiction of this Board the Supreme Court of the United States in the case of *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72, at page 84, made the following statement:

> "But title III was not enacted to provide a tribunal to determine what were the *legal rights and obligations* of railway employers and employees, or to *enforce or protect them. Courts can do that.* The Labor Board was created to decide how the parties *ought* to exercise their legal rights so as to enable them to *co-operate* in running the railroad. It was to reach a *fair compromise* between the parties, *without regard to the legal rights* upon which each side might insist in a court of law."
>
> (Emphasis supplied.)

Thus the language of the Railway Labor Act, the report of the Congressional Committee in recommending its passage, and the language of the Supreme Court in pointing out the jurisdiction of a similar board all reveal that the function of the National Railroad Adjustment Board is basically administrative. The interpretations which it makes of existing agreements are not ends in themselves, but are merely the means by which a continuing legislative purpose is to be effectuated.

70

That purpose is the preservation of interstate commerce from interruptions due to labor disputes and the guarding of the public from the harm which such disputes may cause.

In summary, therefore, we have shown that by general definition "judicial power" includes the power to enter binding decrees and orders, a power not possessed by the National Railroad Adjustment Board. We have shown that the constitutional requirement that judicial power be vested only in courts is not an inflexible rule to the effect that all decisions judicial in nature must be rendered by a court. In many situations such matters have been, and essentially must be, entrusted to administrative agencies if government is to continue to function. The mere fact that the parties to a given controversy are private parties seeking to enforce private rights, the one against the other, will not preclude the vesting of jurisdiction over that controversy in an administrative agency. We have seen further that the Courts have been inclined to look with favor upon legislation giving to administrative tribunals jurisdiction over cases which would otherwise unduly burden judicial tribunals, or where the decision of individual controversies is purely incidental to a wider legislative purpose. An application of these principles to the Railway Labor Act shows conclusively that that statute vests no judicial power in the National Railroad Adjustment Board, and hence that it conforms in all respects to Article III of the Constitution of the United States.

71

No Cause of Action of Any Kind is Stated by the Complaint.

The plaintiff having failed to establish a cause of action for declaratory judgment, it is apparent that the whole complaint must fall for no other cause of action is stated.

Clearly, the plaintiff has made out no claim for money damages at law; likewise no facts are stated which bring the case within the general equity jurisdiction of the Court.

The gist of an action in equity is a wrongful act committed or threatened by the defendant, or a failure on his part to act where there exists a positive legal duty to do so. Either one of these factors, when coupled with a threat of irreparable injury to the plaintiff for which he has no adequate remedy at law, will justify the interposition of a court of equity.

There is no showing in this case that the defendants have failed to perform any legal duty owed by them to the plaintiff. Similarly, it does not appear that any wrongful act has been committed or is threatened by them. The only acts of which they are accused in the complaint are the filing of certain claims with the plaintiff. These claims are for compensation in the nature of damages for breach of contract. Equity jurisdiction has never been held to extend to the enjoining of the filing of claims by one party against another. Especially is this true where the claims filed are merely claims for

money which may be litigated in an action at law, or, as here, through a specified statutory procedure.

Thus it follows that, since relief is not available to the plaintiff through a declaratory judgment, and it has failed to show any basis for general equity relief, the complaint fails to state any cause of action.

CONCLUSION.

In conclusion, therefore, the complaint on its face fails to establish a cause of action justifying the granting of the relief sought.

I. Because a Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

As we have seen such other remedy is provided by the terms of the Railway Labor Act. The granting of a declaratory judgment in this action would nullify the statute in this connection and disregard the plain intent of Congress. Furthermore, if a declaratory judgment is to be made available to the plaintiff and to other carriers similarly situated, the result will be the disruption of the whole administrative process established by the Act.

II. Because a Declaratory Judgment will not be granted as a means of reviewing the decision or another tribunal.

The controversy between the parties to this case has already been decided by the National Railroad Adjustment Board. The procedure authorized by the

73

Declaratory Judgments Act was designed as a means of deciding otherwise undecided issues—not as a procedure for appeal or review.

III. Because a Declaratory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

Insofar as the validity of the order of the National Railroad Adjustment Board is concerned, the Court is without jurisdiction to pass upon the question. The order being in itself unenforceable, no right of the plaintiff can be jeopardized thereby. As to this feature of the case, therefore, the Court is being asked for an academic opinion of the law—not for a decision of an "actual controversy" as provided in the Declaratory Judgments Act.

IV. Because the Railway Labor Act does not vest judicial power in the National Railroad Adjustment Board.

Although the Railway Labor Act vests in the National Railroad Adjustment Board jurisdiction to pass upon rights of and issues pending between private parties, the power so conferred is not a judicial power in the constitutional sense. The number of disputes designed to be passed upon and which are being passed upon by this Board is so vast that to require them to go through the courts would place an unreasonable burden upon the judiciary. Furthermore, the provisions of this Act which set up this separate forum for this type of

case are only incidental to the broad regulatory purposes of the statute.

Accordingly it follows that the complaint has failed to state a cause of action for declaratory judgment. This being true, and there being no allegations in the complaint justifying the Court in granting equitable relief, the complaint fails to state a cause of action of any kind.

Respectfully submitted,

Frank L. Mulholland,
1041 Nicholas Bldg.,
Toledo, Ohio.

Clarence M. Mulholland,
1041 Nicholas Bldg.,
Toledo, Ohio.

Willard H. McEwen,
1041 Nicholas Bldg.,
Toledo, Ohio.

Harold C. Heiss,
Keith Bldg.,
Cleveland, Ohio.

Russell B. Day,
Keith Bldg.,
Cleveland, Ohio.

William E. Willias,
Kellogg Bldg.,
Washington, D. C.
Attorneys for Defendants.

75

APPENDIX I.

EXCERPTS FROM RAILWAY LABOR ACT AS AMENDED JUNE 21, 1934. (U. S. C. TITLE 45, CHAPTER 8.)

GENERAL PURPOSES OF THE ACT

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. (U. S. C. Title 45, Section 151 a.)

NATIONAL RAILROAD ADJUSTMENT BOARD

Establishment and Members.

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

76

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act. (U. S. C., Title 45, Sec. 153, Paragraph First (a).)

Divisions.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated oy the carriers and five of whom shall be selected and designated by the national labor organizations of the employees. (U. S. C. Title 45, Sec. 153, First (h).)

Jurisdiction.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (U. S. C. Title 45, 153 First (i).)

Neutral Referee.

"(1) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees. (U. S. C. Title 45, 153 First (1).)

78

Publication and Effect of Awards.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (U. S. C. Title 45, 153 First (m).)

Majority Necessary to Make Award.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it." (U. S. C. Title 45, 153 First (n).)

Orders Directed to Carriers to Apply Awards.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named." (U. S. C. Title 45, 153 First (o).)

Enforcement and Reviews of Orders.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time

limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (U. S. C. Title 45, 153 First (p).)

Limitation of Actions.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the

time the cause of action accrues under the award of the division of the Adjustment Board, and not after." (U. S. C. Title 45, 153 First (q).)

Annual Reports.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers." (U. S. C. Title 45, 153 First (v).)

LOCAL AND SYSTEM ADJUSTMENT BOARDS MAY BE ESTABLISHED.

"Sec. 3. Paragraph Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment

81

of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board." (U. S. C. Title 45, Sec. 153, Paragraph Second.)

82

APPENDIX II.

EXCERPTS FROM MEMORANDUM OF UNDERSTANDING INCORPORATED IN GENERAL ORDER 13 OF THE FEDERAL DIRECTOR-GENERAL OF RAILROADS ISSUED MARCH 22, 1918.

"*It is understood,* That *all controversies growing out of the interpretation or application of* the provisions of the wage schedule or *agreements which are not promptly adjusted by the officials and the employees* on any one of the railroads operated by the Government shall be disposed of in the following manner:

"1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

"8. The board question of wages and hours will be considered by the Railroad Wage Commission, but *matters of controversies arising from interpretations of wage agreements,* not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

"10. Personal *grievances or controversies arising under interpretation of wage agreements, and all other disputes* arising between officials of a railroad and its employees, covered by this understanding, *will be han-*

dled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), *when, if an agreement is not reached,* the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned *shall refer the matter, with all supporting papers,* to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

"12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

"14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require

84

information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

"15. *All decisions of the Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the board.*

"16. After a matter has been considered by the board, and *in the event a majority vote can not be obtained, then any four members of the board may elect to refer the matter upon which no decision has been reached to the Director-General of Railroads for a final decision.*"

85

APPENDIX III.

EXCERPTS FROM AGREEMENT ESTABLISHING SOUTHEASTERN REGIONAL BOARD OF ADJUSTMENT UNDER THE PROVISIONS OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

"(1) That *all disputes growing out of personal grievances or out of the interpretation or application of the schedules, agreements or practices* now, or hereafter established on the railroads signatory hereto, *which cannot be adjusted by direct conference between representatives of the individual railroad and its respective employees,* shall be disposed of in the following manner:

"(2) There shall be created as soon as practicable a Railroad Board of Adjustment to be known as 'Train Service Board of Adjustment for the Southeastern Region' (hereinafter referred to as the Board), to consist of *eight members; four to be selected by the said railroads, and one each by the chief executive officer of each of the four organizations of employees,* hereinbefore named.

"(7) The Board shall render decisions on all matters in dispute, as provided in Section 1 and 8 hereof, and when properly submitted to the Board.

"(8) *Disputes* arising between a railroad and its employees covered by this agreement *will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad* (or someone officially designated by

him), when, if an agreement is not reached, the Chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall *refer the matter, with all supporting papers, to the Board,* which Board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned, of the time set for hearing.

"*In the event that either party to a dispute declines to become a party to a joint submission, as above provided, then either party may refer the dispute to the Board under such regulations as the Board may prescribed.*

"On a written petition signed by not less than one hundred unorganized employees of the classes covered by this agreement, directly interested in the dispute, the Board shall hear and decide any dispute covered by this agreement; provided, that no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees parties thereto, shall be considered as a dispute under this agreement.

87

"(13) *All decisions of the Board shall be approved by a majority vote of the full membership of the Board, and shall be final and binding upon the parties to the dispute.*

"(14) If a dispute has been considered by the Board, *but a majority vote, as provided above, cannot be obtained, then, upon the request of either party to the dispute, the Board shall certify such dispute to the United States Railroad Labor Board for final decision, accompanied by all supporting papers.*"

88

APPENDIX IV.

EXCERPTS FROM INTERSTATE COMMERCE ACT AND THE PACKERS AND STOCKYARDS ACT.

Interstate Commerce Act.

"Sec. 16. (1) If, after hearing on a complaint made as provided in Section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

"(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the District Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs

82

in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"3 (b). All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to sub-division (d) of this paragraph."

"3 (f). A petition for the enforcement of an order of the commission for the payment of money shall be filed in the District Court or the State Court within one year from the date of the order, and not after." (U. S. C. Title 49, Section 16, Paragraphs 1, 2, 3 (b), and 3 (f).)

Packers and Stockyards Act.

"(a). Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the 'defendant') in violation of the provisions of sections 205, 206, 207, or 208 of this chapter, or of an order of the Secretary made under sections 201 to 217 inclusive of this chapter, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing,

90

within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper."

"(e). If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay the complainant the sum to which he is entitled on or before a day named."

"(f). If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the District Court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State Court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders

of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suits." (U. S. C. Title 7, Section 210, Paragraphs a, e, and f.)

[redacted]

Filed April 11, 1939

159

TABLE OF CONTENTS.

	Page
Nature of the Case	1
Statement of Facts	2
Issues of Law Presented	4
Points and Authorities	
Point 1.	
THE FACT THAT THE RAILWAY LABOR ACT PROVIDES A PROCEDURE FOR ADJUSTING DISPUTES GROWING OUT OF THE INTERPRETATION OF AGREEMENTS BETWEEN CARRIERS AND THEIR EMPLOYES DOES NOT OUST THE JUDICIAL COURTS OF JURISDICTION TO RENDER DECLARATORY JUDGMENTS INTERPRETING SUCH AGREEMENTS..	7
A. It is well established by the decisions that in spite of the provisions of the Railway Labor Act carriers and their employes may resort to the ordinary judicial courts for the enforcement of agreements respecting rules and working conditions either by way of an action for damages or a bill for an injunction....	8
B. If the effect of the Railway Labor Act is not to oust the jurisdiction of the courts generally, or in damage suits and injunction proceedings springing from contracts, it does not operate to oust their jurisdiction in proceedings under the Declaratory Judgments Act	17

Page

C. Defendants' argument that the existence of the Adjustment Board procedure ousts the courts of jurisdiction to render a declaratory judgment rests primarily on certain broad statements found in text book authorities which, when properly read and construed in the light of the decisions upon which they are based, do not support the argument 20

D. The policy of the Railway Labor Act as embodied in the statute does not oust the jurisdiction of the courts to determine and enforce legal rights arising under contracts between carriers and their employes; and if it did so operate to oust jurisdiction in declaratory judgment proceedings it would operate likewise to oust jurisdiction in damage suits and injunction proceedings, which is shown by the precedents not to be the case 27

E. The analogy of the Interstate Commerce Act and the Packers and Stockyards Act lends no support to defendants' contention that the Railway Labor Act ousts the jurisdiction of the ordinary courts.. 36

Point II.

PLAINTIFF IS NOT PRECLUDED FROM MAINTAINING THIS SUIT BY REASON OF THE FACT THAT THE ISSUES INVOLVED IN THE PRESENT CONTROVERSY HAVE BEEN SUBMITTED TO THE NATIONAL RAILROAD ADJUSTMENT BOARD BY A LABOR ORGANIZATION REPRESENTING THE DEFENDANTS AND THAT

Page

AS A RESULT OF SUCH SUBMISSION THE BOARD HAS MADE A PURPORTED AWARD AND ORDER THEREON 41

Point III.

DEFENDANTS AND OTHERS OCCUPYING A LIKE SITUATION WILL NOT BE DEPRIVED OF ANY LEGAL RIGHTS IF IT IS HELD THAT A PROCEEDING FOR A DECLARATORY JUDGMENT WILL LIE IN THE INSTANT CASE; WHEREAS IF PLAINTIFF IS DENIED RELIEF BY WAY OF THE DECLARATORY JUDGMENT PROCEDURE, IT WILL BE WHOLLY DEPRIVED OF JUDICIAL PROTECTION OF ITS CONTRACT RIGHTS AND EXPOSED TO SERIOUS AND INCREASING HARDSHIP AND LOSSES 58

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 57 Sup. Ct. 461 (1937) 5-6

Aetna Life Insurance Co. v. Quarles, 92 Fed. (2d) 321 (C. C. A. 4th), (1937) 22

Aetna L. Ins. Co. v. Richmond, 107 Conn. 117, 139 Atl. 702 (1927) 24

Bell Telephone Company v. Lewis, 313 Pa. 374, 169 Atl. 571 (1934) 21

Blaine County Canal Co. v. Hansen, 49 Idaho 649, 292 Pac. 240 (1930) 12

Bowman v. Gum, Inc., ———, 184 Atl. 285 (Pa., 1936) 22

Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 Pac. (2d) 971 (1934)..... 8

Burfenning v. Chicago, St. Paul, Minn. & Omaha R. Co., 163 U. S. 321 (1896) 51

Page

Burton v. Oregon-Washington Railroad & Navigation Co., 148 Oregon 648, 38 Pac. (2d) 74 (1934) 18
Cann v. Williams Land & Live Stock Co., 56 Nev. 242, 48 Pac. (2d) 887 (1935) 12-13
Carter v. Carter Coal Co., 298 U. S. 238, 56 Sup. Ct. 855 (1936) 53
City of Erie v. Phillips, 323 Pa. 557, 187 Atl. 203 (1936) 21
Cowles v. Arkansas & L. M. Ry., 10 Fed. (2d) 242 (D. C. W. D. La., (1925) 16
Ermine v. Frankel, 322 Pa. 70, 185 Atl. 269 (1936) 22
Flint v. Attorney General, (1918) 1 Chancery 216 25
Florestano v. Northern Pac. Railway Co., 198 Minn. 203, 269 N. W. 407 (1936) 9
Franklin v. Pennsylvania-Reading S. S. Lines, 122 N. J. Equity 205, 193 A. 712 (1937)..... 9
Gary v. Central of Georgia R. Co., 37 Ga. App. 744, 141 S. E. 819 (1928) 15
Gegiow v. Uhl, 239 U. S. 3 (1915) 47
Goldberg & Sons v. Gilet Bldg. Corp., 135 Misc. 158, 237 N. Y. Supp. 258 (1929)..... 24
Grand Junction Water Works Company v. Hampton Urban District Council, (1898), 2 Chancery 331 26
Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285 (1922) 38
Gregg v. Starke, 189 Ky. 32, 224 S. W. 458 (1920) 15
Haan v. Haan, 133 Misc. 197, 231 N. Y. Supp. 58 (1928) 26
In Re Stetson's Estate, 305 Pa. 62, 155 Atl. 856 (1931) 22
Kaaa v. Waiakea Mill Co., 29 Haw. 122 (1926).... 24
Kimmell's Appeal, 96 Pa. Superior Ct. 488 (1929) 24
Kerbach Co. v. City of Long Beach, 8 Cal. App. (2d) 567, 48 Pac. (2d) 181 (1935)..... 12
Lane v. Union Terminal Co., 12 F. Supp. 204 (D. C. N. D. Tex., 1935) 9-10

Page

Leafgreen v. La. Bar, 293 Pa. 263, 142 Atl. 224 (1928) 24
Long v. B. & O. R. R. Co., 155 Md. 265, 141 A. 504 (1928) 16
Louisville & Nashville R. Co. v. B. F. Bryant, et al., 263 Ky. 578, 92 S. W. (2d) 749 (1936) 18
Lyons v. St. Joseph Belt Ry. Co., 84 S. W. (2d) 933 (Mo. 1935) 9
Marine Lighterage Corporation v. Luckenbach, 139 Misc. 612, 248 N. Y. Supp. 71 (1931) 26
Mayor of Davenport v. Tozer (1902), 2 Chancery 182 25
McCrory v. Kurn, 101 S. W. (2d) 114 (Mo. 1936) 9
Mitchell Coal Co. v. Pennsylvania Railroad Co., 230 U. S. 247 (1913) 39
Earl Moore v. I. C. Railroad Co., 180 Miss. 276, 176 So. 593 (1937) 9
Moore v. Louisville Hydro Electric Co., 226 Ky. 20, 10 S. W. (2d) 466 (1928) 22-23-25
Morgan v. United States, 298 U. S. 468, 56 Sup. Ct. 906 (1936) 57
Mutre v. Alexander, 23 Ont. Law Reports 396 (1911) 25
M. Y. & Ry. Co. v. Township of Cornwall, 29 Ont. Law Reports 522 (1913) 25
McCalmont v. McCalmont, 93 Pa. Superior Ct. 203 (1928) 21
McCoy v. St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S. W. (2d) 175 (1934) 15
McGregor v. L. & N. Ry. Co., 244 Ky. 635, 51 S. W. (2d) 952 (1932) 15
Nord v. Griffin, 86 F. (2d) 481 (C. C. A. 7th, cert. den., 300 U. S. 673, 57 Sup. Ct. 12) (1936) .. 9-10
North American Cold Storage Co. v. Chicago, 211 U. S. 306 (1908) 50
Oldham County v. Arvin, 244 Ky. 551 (1932) 26
Panhandle & S. F. Ry. Co. v. Wilson, 55 S. W. (2d) 216 (Tex. 1932) 15

Page

Petition of Kariker, 284 Pa. 455, 131 Atl. 265 (1925) 21
Petition of State ex rel. Hutchinson, 182 S. C. 369, 189 S. E. 475 (1927) 12
Piercy v. L. & N. Ry. Co., 198 Ky. 477, 248 S. W. 1042 (1923) 15-18
Proctor v. Avondale Heights Co., 200 Ky. 477, 255 S. W. 811 (1923) 24
Rentschler v. Missouri Pac. Ry. Co., 126 Neb. 493, 253 N. W. 694 (1934) 15
George T. Ross Lodge v. Brotherhood of Railroad Trainmen, et al., 191 Minn. 373, 254 N. W. 590 (1934) 15
Shannahan v. United States, 303 U. S. 596 50
Shearer v. Backer, 207 Ky. 455, 269 S. W. 543 (1925) 24
Shields v. Utah-Idaho Central R. R. Co. (59 Supreme Court Reporter, Advance Sheets, page 160) (1938) 50-51-52
Smeeten v. Attorney General (1920), 1 Chancery 85 26
Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 Sup. Ct. 288 (1911) 48
State v. Wyandotte County, 117 Kans. 151, 230 Pac. 531 (1924) 24
Stenzel v. Kronick, 283 Pac. 93 (Cal. App., 1929) 24
Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930) 24
Stewart v. Hertin, 125 Neb. 210, 249 N. W. 552 (1933) 22-23
St. Joseph's Stockyard Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936) 46
Stukey v. N. Y. C. & St. L. R. R. Co. (Court of Common Pleas of Allen County, Ohio, 1936). 9-11
Swilley v. G. H. & S. A. Ry. Co., 96 S. W. (2d) 105 (Tex., 1936) 9
Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U. S. 426 (1907) 37-38-39-41

Page

Tucker v. Missoula Light and Water Co., 77 Mont. 91, 250 Pac. 11 (1926) 12
Union Trust Co. v. Georke Co., 103 N. J. Equity 159, 142 Atl. 560 (1928) (modified, in other respects, in 147 Atl. 439) 25
United States v. D. & S. T. Ry. Co., 213 U. S. 366.. 35
United States v. Griffin, 303 U. S. 226, 58 Sup. Ct. 60 (1938) 50
Waite v. Macy, 246 U. S. 606 (1918) 49
Washington-Detroit Theatre Co. v. Moore, 229 N. W. 618 (Mich. 1930) 24
West v. Lord Sackville, (1903) 2 Ch. 378..... 24
White v. Old York Rd. Country Club, 318 Pa. 346, 178 Atl. 3 (1935) 22
Wight v. Board of Education, 99 N. J. Equity 843, 133 Atl. 387 (1926) 25
Young v. Bridges, 86 N. H. 135, 165 Atl. 272 (1933) 22-23

Statutes Cited.

The Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, Sec. 13, 46 P. S. Sec. 156 22
Railway Labor Act, 45 U. S. C. A., Sec. 153(i), 11 Note
Judicial Code, Section 51 (28 U. S. C. A., paragraph 112) 60

Table of Miscellaneous Citations.

16 American Jurisprudence 295 20
Borchard, The Federal Declaratory Judgments Act, 21 Va. L. Rev. 35, 39 (1934)..... 19
Borchard, Declaratory Judgments, 156-157 (1934) 20

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

v.

F. E. BOSWELL, ET AL., *Defendants*.

Plaintiff's Memorandum of Points and Authorities in Opposition to Memorandum Brief of Defendants.

Filed April 11, 1939

Nature of the Case.

This motion challenges the validity of the two defenses included in the answer which raise purely legal issues. Those defenses are, first, that the complaint fails to state a cause of action under the Declaratory Judgments Act (28 U. S. C., Sec. 400), and, secondly, that the complaint fails to state any cause of action.

Actually both defenses are in effect one and the same since it appears from defendants' memorandum brief that by the second defense they simply mean that on the case presented in the complaint no judicial remedy would at this time be available to the plaintiff otherwise than by way of declaratory judgment. This plaintiff concedes. It is in fact the reason why plaintiff seeks a declaratory judgment and not some other form of judicial relief.

The issue for present determination by this court is therefore whether on the facts stated in the complaint a petition for a declaratory judgment will lie. Defendants' contention that it will not lie is placed in their memorandum brief on a single very narrow ground, viz., that the controversy is of a nature which, under the Railway Labor Act, may be referred to the so-called Railroad Adjustment Board for settlement and that this provision of the Railway Labor Act operates to oust the jurisdiction of the ordinary courts to render a declaratory judgment.

Statement of Facts.

This is a suit of a civil nature for a declaration of rights under a certain written contract or "Collective Agreement" executed February 1, 1923, between the plaintiff and its employees of the class to which defendants belong, to the benefit of which contract plaintiff admits that defendants are entitled. Defendants have presented claims to the plaintiff that under said contract they are entitled by reason of seniority to do all the work of a certain character which is or may be performed on the premises of the plaintiff (Complaint, paragraph 19). Plaintiff contends that the defendants' rights of seniority under said contract do not entitle them to what they claim, and since said work is continuing to be performed by others, defendants have been and are presenting to plaintiff demands for sums of money as payment for the work which according to their contention plaintiff is preventing them from performing (Complaint, paragraph 29).

The controversy between plaintiff and defendants therefore turns wholly on the interpretation of a written contract, and the rights which are in dispute derive entirely from that contract. This is admitted in de-

fendants' memorandum brief, page 51, where it is said, referring to the claims of the defendants, that "these claims are based upon the agreement of 1923."

Again, at page 19 of their memorandum brief, defendants say:

> "The dispute between the plaintiff and the defendants in the present case is one growing out of the interpretation which the plaintiff has put upon the Collective Agreement of 1923."

It is true that after the dispute first arose the defendants, through their labor organization, presented their claim under the Railway Labor Act to the National Railroad Adjustment Board (Complaint, paragraph 19) and that Board, through an umpire, adopted and published an award supporting the defendants' claim. The Board, however, did not and could not create through its award any new rights for defendants other than those arising out of the contract and defendants accordingly admit in their brief that subsequent to the award of the Board, as well as prior thereto, whatever rights they claim are based on the contract and not on the order of the Board:

> "These claims are *based upon the agreement of 1923—not upon the order of the Board.*" (Emphasis as in defendants' brief, page 51)

Again, at page 53 of their brief, defendants say:

> "When the individual defendants presented to the plaintiff individual claims for compensation they necessarily based those claims upon the agreement—not upon the order, which has no substantive effect and is in itself unenforceable. . . . The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

Again, it is said in defendants' brief at page 5:

> "It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923."

In short, the dispute which exists now between the parties is, as it has always been, a controversy as to the interpretation of a contract and the respective rights of the parties thereunder.

Issues of Law Presented.

It was precisely for the purpose of providing a more effective method of obtaining a judicial construction of written instruments and a determination of disputes arising out of such instruments that the Federal Declaratory Judgments Act was enacted. The Judiciary Committee of the Senate, in Senate Report No. 1005, 73rd Congress, 2nd Session, in recommending the passage of the Act, used the following language:

> "It enables disputes arising out of written instruments or otherwise to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed."

The Act has been held to be especially applicable where one party to such a dispute makes a claim against the other and by failing to prosecute such claim through the channels of judicial procedure places the other at the disadvantage of having the amount of the claim increase, and of having to accumulate reserves against ultimate potential liability during the interval

of the first party's inaction. Thus, in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 57 Sup. Ct. 461 (1937), a party insured by the plaintiff company presented a formal claim of a present specific right. The company made an equally definite claim that under the contract the right did not exist. The insured did not institute any action wherein the company would have an opportunity to prove the non-existence of the alleged right. It was held that under the Act the company became entitled to bring suit for a declaratory judgment against the insured because the character of the controversy and the issue to be determined was essentially the same whether presented by the insured or the insurer.

In the instant case it is alleged in plaintiff's complaint (paragraph 32) that "although the issues upon which the validity of the defendants' demands and the liability of plaintiff to satisfy them are as a matter of evidence and proof capable of determination at this time, the plaintiff by reason of there being no judicial determination of plaintiff's liabilities with respect to such demands is compelled to maintain and make available substantial amounts of money to satisfy such demands . . . in the event it should . . . be determined that the plaintiff is legally liable with respect thereto."

It therefore seems clear that apart from the possible existence of some special legal obstacle, the controversy which is the basis of the present proceeding is one which is pre-eminently of the character to which the Declaratory Judgments Act was intended to apply. It is a controversy concerning actual present rights under a written instrument, and, as in the *Haworth Case, supra*, a controversy which could be brought immediately to judicial determination by the action of the

defendants in instituting legal proceedings. The failure of the defendants to do so is placing the plaintiff at a serious disadvantage, and, on the doctrine of the *Haworth Case*, since the defendants could present the issue, the plaintiff is entitled to do so under the Declaratory Judgments Act.

The sole question is whether there are any special and peculiar legal barriers which prevent the plaintiff from doing so.

The defendants contend that there are two.

In the first place, defendants contend that plaintiff is not entitled to the benefits of the Declaratory Judgments Act because, by the Railway Labor Act, Congress has established a procedure whereby disputes between a carrier and an employe or group of employes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions *may* be referred for adjustment by either party to the National Railroad Adjustment Board. Defendants apparently contend that this provision ousts the ordinary judicial courts of their jurisdiction over controversies with respect to the interpretation or application of such agreements.

Secondly, defendants contend that since the labor organization representing the defendants submitted the present controversy to the Adjustment Board and the Board made an award, the plaintiff is precluded from instituting court proceedings with respect to the controversy since to do so would be to make the declaratory judgment procedure a means of reviewing the decision of another court or tribunal of co-ordinate jurisdiction, viz., the Adjustment Board.

In the remainder of this brief it will be argued that both contentions are without merit.

Points and Authorities.

I.

THE FACT THAT THE RAILWAY LABOR ACT PROVIDES A PROCEDURE FOR ADJUSTING DISPUTES GROWING OUT OF THE INTERPRETATION OF AGREEMENTS BETWEEN CARRIERS AND THEIR EMPLOYES DOES NOT OUST THE JUDICIAL COURTS OF JURISDICTION TO RENDER DECLARATORY JUDGMENTS INTERPRETING SUCH AGREEMENTS.

The contention of the defendants that the plaintiff is denied the right to a judicial interpretation of its contract with its employees because Congress has provided that disputes arising under labor agreements may be adjusted through the procedure of the Railroad Adjustment Board is contrary to all the decided cases on the subject, which are numerous, as well as to reason and principle. It is well settled by the decisions that, in spite of the provisions of the Railway Labor Act, carriers and their employes may resort to the ordinary judicial courts for the enforcement of agreements respecting rules and working conditions either by way of an action for damages or a bill for an injunction. If the courts are open for proceedings of this character and the Railway Labor Act creates no bar, there is no sound reason for holding that they are not equally open for proceedings for a declaratory judgment. The arguments which would oust them of jurisdiction to render a declaratory judgment would, if valid, operate as effectively to oust their jurisdiction in damage suits and injunction proceedings. In the only case directly involving the point it has been expressly held that a declaratory judgment may be rendered in a controversy of the character which might be brought before the Railroad Adjustment Board. Defendants' argu-

ment that the existence of the Adjustment Board procedure ousts the courts of jurisdiction to render a declaratory judgment rests primarily on certain broad statements found in textbook authorities which, when properly read and construed in the light of the decisions upon which they rest, do not support the argument. Defendants' additional arguments drawn from the supposed policy of the Railway Labor Act find no support in the provisions of the Act; and the analogy attempted to be drawn from certain provisions of the Interstate Commerce Act breaks down in the light of the fact that those provisions have been held not to oust the jurisdiction of the courts. Each of these points will be developed.

A. *It is well established by the decisions that in spite of the provisions of the Railway Labor Act carriers and their employes may resort to the ordinary judicial courts for the enforcement of agreements respecting rules and working conditions either by way of an action for damages or a bill for an injunction.*

Since the enactment of the Railway Labor Act in its present form on June 21, 1934, cases have been numerous in which carriers or their employes have resorted to the courts either by actions for damages or by injunction proceedings to enforce rights claimed under contracts of the character which under the Railway Labor Act might have been submitted for adjustment to the Railroad Adjustment Board. Such cases are the following:

Brotherhood of Locomotive Engineers v. *Mills*, 43 Ariz. 379, 31 Pac. (2d) 971 (1934) (suit to enjoin defendants, including Southern Pacific Ry., from interfering with plaintiffs' seniority rights by merger of two railroads);

Florestano v. *Northern Pac. Railway Co.*, 198 Minn. 203, 269 N. W. 407 (1936) (suit at law for damages for alleged breach by the railroad of a seniority agreement);

Earl Moore v. *I. C. Railroad Co.*, 180 Miss. 276, 176 So. 593 (1937) (suit at law for damages for alleged breach by the railroad of a seniority agreement);

Swilley v. *G. H. & S. A. Ry. Co.*, 96 S. W. (2d) 105 (Tex., 1936) (action at law for damages for breach of contract of employment);

Nord v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936, cert. den. 300 U. S. 673, 57 Sup. Ct. 12) (injunction suit to restrain railroad and certain employes from interfering with plaintiff's seniority rights);

Lane v. *Union Terminal Co.*, 12 F. Supp. 204 (D. C. N. D. Tex., 1935) (suit in equity to enjoin defendant from depriving plaintiff of certain rights which he alleged were given to him by agreement);

Stukey v. *N. Y. C. & St. L. R. R. Co.* (Court of Common Pleas of Allen County, Ohio, 1936); (suit to enjoin railroad and a labor union from depriving plaintiff of certain seniority rights by reason of a consolidation of certain divisions of the railroad);

Franklin v. *Pennsylvania-Reading S. S. Lines*, 122 N. J. Equity 205, 193 A. 712 (1937) (suit in equity to prevent a change in the seniority status of plaintiffs which involved the construction of an agreement covering working conditions between the employees and the railroad);

McCrory v. *Kurn*, 101 S. W. (2d) 114 (Mo. 1936) (action at law for damages for wrongful discharge in violation of labor agreement);

Lyons v. *St. Joseph Belt Ry. Co.*, 84 S. W. (2d) 933 (1935) (action at law for damages for wrongful discharge in violation of collective agreement).

In not one of these cases did the court hold that it was ousted of jurisdiction to interpret and enforce

an agreement because the dispute with respect to the agreement was one which, under the provisions of the Railway Labor Act, might have been submitted to the National Railroad Adjustment Board.

In *Lane* v. *Union Terminal Co., supra,* the court, speaking of the effect of Section 3(p) of the Railway Labor Act upon Lane's right to maintain his suit, said (at page 205):

> "Lane does not rest for the equity powers which he invokes on the Railway Labor Act of 1934. He enters a court of general jurisdiction as a citizen, asking for his constitutional rights, not under the act nor by virtue of the act, but in spite of the act. The Clayton Act cases . . . are, it appears to me, besides the question. In cases of that class, recovery was sought by virtue of the national law itself. Without such national statute, there was no right of recovery. . . .
>
> "The same may not be said of Lane's rights as asserted here. He claims the right to labor. He claims certain seniority conditions. He claims to satisfy his employer. He claims that certain of his constitutional rights are about to be invaded. He seeks protection from such invasion against those whom he charges with the determination to trespass upon his rights in a court which has jurisdiction over the potential trespassers. That the alleged trespassers may be hiding behind a national statute does not limit Lane's right to enter the court of his choice. He has a right to sue where he pleases."

In *Nord* v. *Griffin, supra,* it was argued against the jurisdiction of the court that under the provisions of the Railway Labor Act the district courts are given jurisdiction in certain cases to "enforce" awards of the Railroad Adjustment Board, and that therefore, except in such enforcement proceedings, they were ousted of all other jurisdiction with reference to con-

tracts which might be made the subject of such awards. This argument the court rejected, saying (at pages 483 and 484):

> "Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred. . . . The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

In *Stukey* v. *N. Y. C. & St. L. R. R. Co., supra*, certain employes of a railroad sought an injunction to restrain the railroad and a labor organization from depriving them of seniority rights by a consolidation of divisions of the railroad. The contention was made that the word "may" in Section 3(i) of the Railway Labor Act[1] was mandatory, that the remedy therein provided was an exclusive one, which deprived the court of jurisdiction over the controversy. The court rejected this contention and said:

> "The word 'may' in Sections 153-i and 155 of this Act seems only to have been used in a 'permissive' sense and there does not seem to be anything in the Act to warrant an interpretation that it is used in a 'mandatory' sense."

Elsewhere the court said:

> "It is claimed that the spirit as well as the language of the Act requires that the disputes be

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[1] Section 3(i) of the Railway Labor Act provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

> brought before the Railroad Adjustment Board as well as authorizing such a course. Whatever may be interpreted as the spirit of the Act the language of the Act nowhere by clearly expressed intention attempts to vest exclusive jurisdiction in the National Railroad Adjustment Board."

These cases but illustrate and apply the elementary principle that where a statute does not create a new and purely statutory right but simply provides a novel method of procedure for determining and enforcing a right which exists at common law, the statutory remedy will be held to be merely cumulative and not exclusive in the absence of express statutory provision making it exclusive.

Of numerous decisions illustrating this principle, the following ones may be cited:

> *Petition of State ex rel. Hutchinson*, 182 S. C. 369, 189 S. E. 475 (1937);
> *Kerbach Co.* v. *City of Long Beach*, 8 Cal. App. (2d) 567, 48 Pac. (2d) 181 (1935);
> *Cann* v. *Williams Land & Live Stock Co.*, 56 Nev. 242, 48 Pac. (2d) 887 (1935);
> *Blaine County Canal Co.* v. *Hansen*, 49 Idaho 649, 292 Pac. 240 (1930);
> *Tucker* v. *Missoula Light and Water Co.*, 77 Mont. 91, 250 Pac. 11 (1926).

In *Petition of State ex rel. Hutchison, supra*, a South Carolina statute provided a method for securing the appointment of a receiver for securities deposited by foreign insurance companies with the State insurance commissioners in the event of the companies' insolvency and provided that a creditor "may, at any time, bring, in the Circuit Court for the County of Richland," an action for this purpose. Instead of proceeding under the statute, one Carroll applied to the Cir-

cuit Court of Marlboro County under its general equity powers and secured the appointment of a receiver. This proceeding was thereupon brought in the State Supreme Court for a writ of prohibition to prohibit further proceedings in the Circuit Court of Marlboro County on the ground that the statute provided an exclusive remedy and therefore the Circuit Court of Marlboro was without jurisdiction. The writ was denied. It was held that the remedy was not exclusive but only "alternative or cumulative" because the right sought to be enforced was not one created by the statute. The court said (at page 477):

> "It is to be noted that there is no language in this section of the Code suggesting or declaring that the method of procedure therein outlined shall be mandatory or exclusive; there are no words of negation or prohibition which prohibit the other circuit courts of the state from entertaining jurisdiction. It would seem reasonable to conclude that, if the Legislature had intended to give the circuit court of Richland county exclusive jurisdiction in actions of this kind, it would have used apt words, clearly indicating such intention.
>
> "It has generally been held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive unless the statute clearly shows a contrary intention. Such an exclusion, however, depends upon the creation of a new right.
>
> • • • • • •
>
> "The section of the Code under discussion does not provide a new right or create a new cause of action, but merely provides a cumulative remedy."

To the same effect is *Cann* v. *Williams Land & Live Stock Co., supra,* where the court said:

> "Where a statute providing a remedy does not create a new right, but merely provides a new rem-

> edy for a pre-existing right, it is ordinarily held that such remedy is not exclusive, but merely cumulative . . . Any right may be asserted or any wrong redressed under the new procedure that could have been asserted or redressed under the old, while on the other hand the change does not create any new rights or causes of action, or authorize a recovery where none could previously have been had in any form of action. If a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not as a rule take away the common law remedy, but the parties may still sue at common law as well as upon the statute. In such cases the statutory remedy is regarded as merely cumulative. 1 R. C. L. 323, 324; 1 C. J. 988, 989, 991, 1003, 1004; Pomeroy, Code Remedies (5th ed.) Sections 8, 9, 13."

There is no contention that the Railway Labor Act creates the rights under labor contracts for the adjustment of which it provides its peculiar procedure. Those rights are contract rights arising out of and existing under common law. As already pointed out, defendants not only admit but reiterate this in their brief in the passages quoted above where they emphasize that the rights in dispute in the case at bar are based upon the agreement of 1923 and that the controversy between the parties here is one growing out of the interpretation and application of that agreement.

Long before the Railway Labor Act of 1934 was enacted, labor contracts of the character here in question formed the subject matter of controversy in the courts under the established principles of the common law and of equity and the courts took jurisdiction of

their interpretation and enforcement. Among such cases may be cited the following:

Piercy v. *L. & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923) (suit for declaratory judgment construing agreement between employes and the railroad and declaring plaintiff's rights thereunder);

McGregor v. *L. & N. Ry. Co.*, 244 Ky. 635, 51 S. W. (2d) 952 (1932) (action by a telegraph operator against railroad to enforce seniority rights under a contract between the railroad and telegraphic employees);

Panhandle & S. F. Ry. Co. v. *Wilson*, 55 S. W. (2d) 216 (Tex. 1932) (action at law for damages for alleged breach of an agreement covering seniority);

Gregg v. *Starke*, 189 Ky. 32, 224 S. W. 458 (1920) (bill in equity for an injunction to restrain defendant railroad and its general manager from removing plaintiff from his position as conductor on a certain train);

Rentschler v. *Missouri Pac. Ry. Co.*, 126 Neb. 493, 253 N. W. 694 (1934) (action at law to recover wages alleged to be due for a period during which plaintiff was out of work due to a reduction in forces—plaintiff alleged violation of a seniority agreement);

McCoy v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934) (action for damages for breach of an agreement regulating seniority);

George T. Ross Lodge v. *Brotherhood of Railroad Trainmen, et al.*, 191 Minn. 373, 254 N. W. 590 (1934) (bill in equity to restrain labor union and the Northern Pacific Railway Co. from interfering with plaintiff's seniority rights);

Gary v. *Central of Georgia R. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928) (action at law for dam-

ages for breach of contract covering working conditions between employees and railroad);

Long v. *B. & O. R. Co.*, 155 Md. 265, 141 A. 504 (1928) (suit for injunction to compel railroad to recognize and enforce plaintiff's alleged right to a particular position by virtue of an agreement between the railroad and employees);

Cowles v. *Arkansas & L. M. Ry.*, 10 Fed. (2d) 242 (D. C. W. D. La., 1925) (suit in equity on claims of employes against railroad for back pay under an order of the Director General of Railroads).

In view of these cases and the principles which they illustrate, it is entirely clear that rights under labor contracts do not derive their validity from the Railway Labor Act of 1934 and that all that that Act does is to provide, alongside the established legal remedies, an available procedure for informal settlement and adjustment of controversies. It seems clear that that procedure is intended to be cumulative and not exclusive. Defendants in effect point this out in that section of their brief (pages 20 to 33, inclusive) where they emphasize that throughout the steps leading up to the passage of the Railway Labor Act Congress sought to provide for the voluntary adoption of methods of adjustment by the parties themselves and has never attempted to force the parties to submit to any compulsory adjustment procedure. As the defendants so aptly point out on pages 20 and 21 of their brief, the National Adjustment Board established by the Act departs from judicial concepts both in its composition and in its procedure. The defendants point out that the Board is intended "to adjust matters submitted to it" and that "a reasonable and acceptable

compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." It is impossible to believe that by the establishment of an informal agency of this character to compromise and adjust differences Congress could have intended to oust the courts from their jurisdiction to determine legal rights and accordingly there is not a single case which holds that the jurisdiction of the courts has in fact been ousted by the Act.

B. *If the effect of the Railway Labor Act is not to oust the jurisdiction of the courts generally, or in damage suits and injunction proceedings, it does not operate to oust their jurisdiction in proceedings under the Declaratory Judgments Act.*

It has been established in the preceding section that the effect of the Railway Labor Act is not to oust the jurisdiction of the courts generally in respect of the interpretation and enforcement of agreements between carriers and their employes by way of actions at law or in injunction proceedings. This seems so clear that defendants make no effort in their memorandum brief to deny it. They take refuge instead in the narrower position that the Railway Labor Act ousts the jurisdiction of the courts in respect of proceedings for a declaratory judgment. This contention is based primarily on an apparent misunderstanding of certain statements of textbook authorities, as will be pointed out in the next section of this brief. In the meanwhile, it is important to note that nothing in precedent or principle justifies the contention that where the jurisdiction of the courts is not ousted generally, and persists with respect to damage suits and injunction proceedings, it is specially ousted with respect to declara-

tory judgment. As a matter of fact, the history and development of the jurisdiction of the courts with respect to the interpretation of labor agreements under the declaratory judgment procedure has followed exactly the same course before and after the enactment of the Railway Labor Act as has their jurisdiction in damage suits and injunction proceedings.

As early as 1923 a proceeding was brought in Kentucky under the Declaratory Judgment Act of that State to determine the seniority rights of conductors in the operation of trains on interdivisional runs under a contract then in effect between the Brotherhood and the Louisville & Nashville Railroad (*Piercy* v. *L. & N. R. Co., supra.*) The court took jurisdiction and made a declaration of rights in favor of plaintiff on the basis of its interpretation of the terms of the agreement.

Subsequently a proceeding was brought under the Declaratory Judgment Act of Oregon to obtain a declaration of a plaintiff's seniority rights under an agreement. The court took jurisdiction, construed the agreement in the light of the practice which had prevailed under it, and gave judgment for the defendants (*Burton* v. *Oregon-Washington Railroad & Navigation Co.*, 148 Oregon 648, 38 Pac. (2d) 74 (1934)).

In the only like case which has arisen since the enactment of the Railway Labor Act, the provisions of that Act were not treated as ousting the jurisdiction of the courts in declaratory judgment proceedings any more than in injunction proceedings and actions for damages. The case is *Louisville & Nashville R. Co.* v. *B. F. Bryant, et al.*, decided by the Court of Appeals of Kentucky, 263 Ky. 578, 92 S. W. (2d) 749 (1936). Bryant and another employe of a railroad brought a proceed-

ing against the railroad and certain other employes for a declaration of their seniority and other contract rights. The court took jurisdiction, construed the agreement, and made a declaration of rights which was in part affirmed and in part reversed on appeal.

Thus, it seems clear that there is no ground for drawing a distinction between the declaratory judgment procedure and other forms of proceedings, such as damage suits and bills for injunctions, which would require or justify the conclusion that if the jurisdiction of the courts has not been ousted with respect to the latter it has been ousted with respect to the former. So far as they relate to jurisdiction over the subject matter of a cause of action, declaratory judgments acts have no effect to widen or narrow that jurisdiction. They simply provide a new form of remedy where jurisdiction over the subject matter already exists. As Professor Borchard has said with reference to the Federal Declaratory Judgments Act in an article written shortly after the passage of the Act (Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 39 (1934)):

> "The Act is merely an amendment to the Judicial Code defining the Federal jurisdiction, and while ostensibly conferring on the courts an additional power in cases already within their jurisdiction by reason of person and subject matter, does not add to such jurisdiction in any respect."

If, then, the Declaratory Judgments Act simply operates within the jurisdiction of a court as that jurisdiction already exists and neither broadens nor narrows it, it seems clear that if the existing jurisdiction, as has been shown above, is not in any way cut down by the provisions of the Railway Labor Act, it survives

as fully for the purposes of the Declaratory Judgments Act as it survives for the purpose of damage suits and injunction proceedings.

C. *Defendants' argument that the existence of the Adjustment Board procedure ousts the courts of jurisdiction to render a declaratory judgment rests primarily on certain broad statements found in text book authorities which, when properly read and construed in the light of the decisions upon which they are based, do not support the argument.*

Defendants' contention that the existence of the Railroad Adjustment Board procedure, while it does not oust the jurisdiction of the courts in damage suits and injunction proceedings, does oust their jurisdiction in Declaratory Judgment proceedings, rests on a quotation from Borchard (Declaratory Judgments, 156-157 (1934)), given at page 13 of their memorandum brief, and on similar language quoted from 16 American Jurisprudence 295, at page 12 of defendants' brief.

The quotation from Borchard is as follows:

> "Where, however, a special statutory method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case and it was not intended that a declaration should be employed for such a purpose."

The pertinent part of the quotation from American Jurisprudence is as follows:

> "A court may not have jurisdiction to render a Declaratory Judgment where another statutory

remedy has been especially provided for the character of case presented if the effect would be to interfere with the rights of the parties to appeal to the court given jurisdiction in that particular matter by the Statute."

These statements of the law derive whatever authority they may have from the actual decisions on which they purport to be based and which are cited in the footnotes supporting them. An examination and analysis of these decisions plainly indicates that the statement that "a court may not take jurisdiction to render a Declaratory Judgment where another statutory remedy has been especially provided for the character of case presented" means, as might indeed be supposed, that this is true only if the "statutory remedy especially provided" is an *exclusive* remedy which ousts the courts of general jurisdiction. The same conclusion follows from the cases specifically cited and discussed in defendants' brief (pages 13-16, inc.).

Of these cases, four were decided by Pennsylvania courts, viz: *Petition of Kariher*, 284 Pa. 455, 131 Atl. 265 (1925); *City of Erie* v. *Phillips*, 323 Pa. 557, 187 Atl. 203 (1936); *Bell Telephone Company* v. *Lewis*, 313 Pa. 374, 169 Atl. 571 (1934); and *McCalmont* v. *McCalmont*, 93 Pa. Superior Ct. 203 (1928). The first three merely repeat, by way of dictum, the statement that a proceeding to obtain a declaratory judgment may not be entertained where a special statutory remedy has been provided for the character of case in hand. The fourth, *McCalmont* v. *McCalmont*, involved an attempt to secure a declaratory judgment for the purpose of annulling a marriage. The legislature had already prescribed in detail the procedural requirements neces-

sary to be followed for the dissolution of marriages and such procedure was exclusive.

The references by the courts in all these Pennsylvania cases to the statement that a declaratory judgment will not be issued where a special statutory proceeding has been provided for the character of case in hand support the principle that by "special statutory remedy" is meant an exclusive remedy that ousts the courts of jurisdiction to proceed except in accordance with the special remedy. This is true because where a remedy or method of procedure is provided by statute in Pennsylvania such a remedy is exclusive by reason of a general act of the Legislature so providing.[2]

Aetna Life Insurance Co. v. *Quarles*, 92 Fed. (2d) 321 (C. C. A. 4th, 1937) merely quotes, as dictum, Borchard's statement above referred to.

The remaining cases cited by the defendants, viz: *Young* v. *Bridges*, 86 N. H. 135, 165 Atl. 272 (1933); *Stewart* v. *Hertin*, 125 Neb. 210, 249 N. W. 552 (1933); and *Moore* v. *Louisville Hydro Electric Co.*, 226 Ky. 20, 10 S. W. (2d) 466 (1928) also illustrate the application of the principle that by "special statutory rem-

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[2] The Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, Sec. 13, 46 P. S. Sec. 156, provides:

> "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

It has been held that, by reason of the operation of the Act of 1806, where a remedy or method of procedure is provided by statute the directions of such statute must be strictly construed and such remedy is exclusive, *Ermine* v. *Frankel*, 322 Pa. 70, 185 Atl. 269 (1936); *Bowman* v. *Gum, Inc.*, ————, 184 Atl. 258 (Pa., 1936); *White* v. *Old York Rd. Country Club*, 318 Pa. 346, 178 Atl. 3, (1935); *In Re Stetson's Estate*, 305 Pa. 62, 155 Atl. 856 (1931).

edy" is meant an exclusive remedy that ousts the courts of general jurisdiction.[3]

The cases just reviewed establish that the statutory remedies which operate to deprive courts of general jurisdiction to render Declaratory Judgments are *exclusive* remedies which would equally operate to oust the ordinary courts of jurisdiction to entertain any other form of proceeding. That the Railway Labor Act does not have that effect has been shown in the preceding sections of this brief.

The conclusion that a statutory form of remedy must be exclusive to oust jurisdiction to render a declaratory judgment is fully substantiated by an examination and analysis of the decided cases upon which the general statements quoted above from Borchard and American Jurisprudence are rested by the authors. The statement in American Jurisprudence is rested on four annotations in American Law Reports, viz.: 12 A. L. R. 75; 50 A. L. R. 48; 68 A. L. R. 119; 87 A. L. R. 1219. Reference to the cases cited in these annota-

[3] In *Young* v. *Bridges*, *supra*, a Declaratory Judgment was asked as to the distribution of an estate. The court very properly pointed out that courts of general jurisdiction are without power to decree the distribution of estates, since such jurisdiction has been exclusively conferred on probate courts and the power to render a Declaratory Judgment does not operate to broaden the jurisdiction of the court. Clearly, where a Declaratory Judgment is sought with reference to a matter which lies outside the jurisdiction of the court in which the petition is brought, the court is without jurisdiction to entertain it. This is also the explanation of *Stewart* v. *Hertin*, 125 Neb. 210, 249 N. W. 552, cited at page 15 of defendants' brief.

In *Moore* v. *Louisville Hydro Electric Company*, *supra*, an attempt was made to obtain through the Declaratory Judgment procedure a determination of a matter lying within the jurisdiction of the Workmen's Compensation Board. It was held that the Declaratory Judgment proceedings would not lie because in the language of the court:

> "The entire mechanics of the law shows that it was the legislative intent to vest exclusive original jurisdiction to hear and determine matters within the purview of the Act in the Workmen's Compensation Board" (Quoted at page 16 of defendant's memorandum brief).

tions discloses that they fall into three groups. One group of cases which may be immediately eliminated apply the rule that a Declaratory Judgment will not be granted where another adequate remedy exists.[4] This rule, which is applied in a number of States, is expressly repudiated in the federal jurisdiction by Court Rule No. 57, which provides that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

A second group of cases cited by A. L. R. and relied upon by American Jurisprudence denied a Declaratory Judgment on the ground that the subject matter in dispute was either pending in another suit previously brought or had already become *res adjudicata.*[5]

The third group of cases bear directly on the question of what is meant by the statement that a Declaratory Judgment proceeding may not lie where a special statutory remedy has been provided and support with-

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[4] *West* v. *Lord Sackville*, (1903) 2 Ch. 378, was not an action for a declaratory judgment but an attempt to "perpetuate testimony" for the purpose of establishing the legitimacy of a child prior to its father's death. The court said that the right to perpetuate such testimony was given only by a court rule and could only be granted at the court's discretion, and that inasmuch as a more efficacious remedy could be had under the Legitimacy Declaration Act of 1858, the court would not permit the perpetuation of testimony in this manner.

Washington-Detroit Theatre Co. v. *Moore*, 229 N. W. 618 (Mich. 1930);
Stenzel v. *Kronick*, 283 Pac. 93 (Cal. App., 1929);
Goldberg & Sons v. *Gilet Bldg. Corp.*, 135 Misc. 158, 237 N. Y. Supp. 258 (1929);
Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930);
Kaaa v. *Waiakea Mill Co.*, 29 Haw. 122 (1926);
Aetna L. Ins. Co. v. *Richmond*, 107 Conn. 117, 139 Atl. 702 (1927);
Kimmell's Appeal, 96 Pa. Superior Ct. 488 (1929).

[5] *Proctor* v. *Avondale Heights Co.*, 200 Ky. 477, 255 S. W. 611, (1923);

State v. *Wyandotte County*, 117 Kans. 151, 230 Pac. 531 (1924);
Leafgreen v. *La. Bar*, 293 Pa. 263, 142 Atl. 224 (1928);
Shearer v. *Backer*, 207 Ky. 455 269 S. W. 543 (1925).

out exception the conclusion stated above that by "special statutory remedy" is meant an exclusive statutory remedy.[6]

An examination of the authorities cited by Professor Borchard in support of his statement of the rule also leads to the conclusion that when he speaks of a "special statutory proceeding" he means an exclusive statutory proceeding.[7]

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[6] Thus, in *Mutre* v. *Alexander*, 23 Ont. Law Reports 396 (1911), the high court refused to grant a declaratory decree involving the validity of a will, for the reason that the court had no testementary jurisdiction and the subject matter of the controversy was vested in the Surrogate Court.

In *M. Y. & R. Ry. Co.* v. *Township of Cornwall*, 29 Ont. Law Reports 522 (1913), exclusive jurisdiction over the assessment of taxes was lodged by statute in the Municipal Board, and therefore it was held that the courts had no jurisdiction to make a declaration of rights with respect thereto.

In *Mayor of Davenport* v. *Toser* (1902), 2 Chancery 182, a bill was filed by a municipality against the owners of certain land for a declaration that the plaintiffs were entitled to move, alter, pull down or otherwise deal with any works thereon begun by the defendants. In refusing a Declaratory Judgment, the court said (page 184) with reference to a statutory remedy available to the plaintiffs:

> "A liability not now existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it. The company is bound to follow the form of remedy provided by the statute which gives them the right to sue."

The court held in *Wight* v. *Board of Education*, 99 N. J. Eq. 843, 133 Atl. 387 (1926), that the power to issue declaratory judgments was vested in a separate equity court and the subject matter of the case presented was one over which the equity court had no jurisdiction. To the same effect is *Union Trust Co.* v. *Georke* Co., 103 N. J. Eq. 159, 142 Atl. 560 (1928) (modified, in other respects, in 147 Atl. 439).

Moore v. *Louisville Hydro-Electric Co., supra.*

[7] He cites *Moore* v. *Hydro-Electric Co.*; *West* v. *Lord Sackville*; *Mayor of Davenport* v. *Toser*; and *McCalmont* v. *McCalmont*, all discussed *supra.*

Other authorities which he cites are as follows:

Flint v. *Attorney General* (1918), 1 Chancery 216. This was a proceeding to obtain a Declaratory Judgment that the plaintiff was exempt from military service under the provisions of the Military Service Acts of 1916. The Military Service Acts provided a procedure whereby persons in the situation of the plaintiff could establish their right to exemption from service. The court decided that it was not one of the courts included

It accordingly seems clear that the principle relied on by the defendants on the authority of Professor Borchard and American Jurisprudence is not so broad as to exclude the jurisdiction to render declaratory judgments wherever there is any alternative statutory remedy available, but reaches only to cases where the statutory remedy is exclusive, either because expressly made so by the legislature or because created by the same statute which creates the right. That the statutory remedy or procedure established by the Railway

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in this statutory procedure and was, therefore, without jurisdiction over the controversy.

Smeeton v. *Attorney General* (1920), 1 Chancery 85. This was a petition for a declaration that the plaintiff was not required to file an excise profits return and was not required to pay a tax. In denying the declaration, the court pointed out that the tax statute provided a procedure by way of appeal to the Revenue Judges from an assessment by the Tax Commissioners and that the plaintiff's remedy lay through the statutory procedure.

Marine Lighterage Corporation v. *Luckenbach*, 139 Misc. 612, 248 N. Y. Supp. 71 (1931). This was a petition for a Declaratory Judgment to the effect that wharfage charges assessed against the plaintiff were excessive. In New York, wharfage charges are by statute fixed by Commissioners and the rights and remedies of the parties are prescribed in the same statute. The petition was, therefore, refused.

Haan v. *Haan*, 133 Mis. 197, 231 N. Y. Supp. 58 (1928), a petition was filed for a declaration that the infant plaintiff was the legitimate child of the defendant and entitled to support. The petition was refused because by statute proceedings relating to children born out of wedlock are within the exclusive jurisdiction of the Court of Special Sessions of the City of New York.

It is to be noted that in the foregoing cases the rights sought to be adjudicated by the declaratory judgment procedure were not rights which, like rights under a private contract, derive from the common law, but were rather rights of special statutory origin and, accordingly, under the principles discussed in earlier sections of this brief the procedures established by the statutes creating the rights in question were held to be exclusive. This is true also of *Grand Junction Water Works Company* v. *Hampton Urban District Council* (1898), 2 Chancery 331, cited by Professor Borchard.

Oldham County v. *Arvin*, 244 Ky. 551 (1932), also cited by Professor Borchard, went on the ground, not available under the Federal rules, that a petition for Declaratory Judgment must be denied if there is another adequate remedy.

Labor Act is not of this character has been made abundantly plain in the two preceding sections of this brief.

D. *The policy of the Railway Labor Act as embodied in the statute does not oust the jurisdiction of the courts to determine and enforce legal rights arising under contracts between carriers and their employes; and if it did so operate to oust jurisdiction in declaratory judgment proceedings it would operate likewise to oust jurisdiction in damage suits and injunction proceedings, which is shown by the precedents not to be the case.*

Defendants argue at page 17-45 of their memorandum brief that by the provisions of the Railway Labor Act Congress has prescribed "a definite procedure to be followed in this type of case" and seek apparently to create the impression that this procedure, in spite of the use of the permissive word "may" in Section 3(i) of the Act, was intended by Congress to be compulsory and exclusive because of the supposed policy of Congress underlying the Act. As pointed out above, this suggestion has been repeatedly rejected in the decided cases and there is no decision supporting it. It remains to be pointed out that it is equally without support in principle or reason.

It should be noted at the outset that, as already emphasized here and admitted by the defendants, the rights with the interpretation and enforcement of which we are concerned are rights growing out of the common law of contract and not special privileges created by statute.

The proposition which defendants urge upon this court is that the protection of these rights has been wholly removed from the jurisdiction of the ordinary

judicial courts and exclusively vested in a type of procedure which they describe with great fullness in their brief as frankly "non-judicial" in character, saying among other things (at page 67 of defendants' memorandum brief) that the function of the Adjustment Board "is not to adjudicate as to rights but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction and without interruption." This is nothing else than to say that Congress has empowered the Board to substitute new rights and obligations between the parties in place of those which they have created by their contract, and to that extent impose a new contract upon them.

Plaintiff does not admit that this is a proper construction of the powers vested in the Board by the statute. However, if it be assumed solely for the purpose of argument that the powers and functions of the Board are to be construed as defendants construe them, it would seem to follow with all the greater force that Congress has not presumed by the establishment of a Board with such powers and functions to oust the judicial courts from their normal jurisdiction to adjudicate rights arising out of contract.

To accept the view that the jurisdiction of the courts to adjudicate is ousted by the establishment of an agency whose function is not to adjudicate but instead to create new relationships by way of "adjustment" would be to say that all jurisdiction to adjudicate such rights had been completely destroyed, a conclusion which plaintiff submits would obviously be violative of the guarantees contained in the Constitution of the United States.

Accordingly, leaving out of account in the present connection the unbroken line of decided cases which hold that the establishment of the procedure under the Railway Labor Act does not oust the jurisdiction of the ordinary judicial tribunals, the question to be considered is whether by the provisions of the Railway Labor Act Congress has indicated a plain intention of a policy to exclude that jurisdiction in favor of the jurisdiction of a board acting in the manner and for the purposes described in defendants' brief.

Defendants point out that the provisions of the Railway Labor Act establishing the National Board of Adjustment are the culmination of a course of experience and experimentation in the settlement of disputes by mutual adjustment dating back to the period of Federal war-time control of the railroads. As a result of the earlier stages of this experience it was provided by the Transportation Act of 1920 that individual carriers might by agreement with their employes or groups of employes establish boards of adjustment for the settlement of disputes (Transportation Act of 1920, Sections 301-303, inclusive, set forth in defendants' memorandum brief, pages 27, 28). In addition to these boards to be set up by individual agreements, provision was also made for the setting up by agreement between a group of carriers and groups of employes of so-called "regional" Boards of Adjustment with a right of appeal in certain cases from the settlements arrived at by these boards to the United States Railroad Labor Board established by the Act.

Defendants admit and indeed insist that the Railroad Adjustment Board established by the Act of 1934 is but a continuation of the device of regional and system boards which functioned since 1920. "It continued

the pre-existing policy of the Government in this regard" (Defendants' memorandum brief, page 30). In this connection a highly significant provision of the Railway Labor Act of 1934 must be mentioned. That Act does not vest the Railroad Adjustment Board with any exclusive jurisdiction to settle and adjust disputes under contracts providing for rules and working conditions. On the contrary, the Act expressly authorizes, as the previous acts had done, separate boards to be established by agreement with individual carriers and provide that where such boards have been established disputes of the character which would otherwise go to the Adjustment Board shall be heard and determined by such separate boards.[8]

In short, the provision of the Railway Labor Act for procedure through the National Railroad Adjustment Board is only one alternative form of procedure set up by that Act, the other procedure being through system and regional adjustment boards. Obviously, if the procedure established by the Act is to be regarded as ousting the jurisdiction of the courts, this must be true of the procedure through such system or regional boards as well as of the procedure through the National Railroad Adjustment Board. Accordingly, if defendants' contention is sound, wherever there is in operation a system board established by agreement between a carrier and its employes to adjust disputes, the existence of this board would operate to prevent the judicial determination of issues arising between the carrier and its

[8] The provision in question is the second sub-division of Section 3 of the Act reading as follows: "nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section."

employes under their contracts. In short, the jurisdiction of the courts would be as effectively ousted by a purely informal and private group of adjusters or mediators as by the board known as the National Railroad Adjustment Board established by the Act.

Defendants are at pains to point out in their brief that the Railroad Adjustment Board is in effect as much a private and informal body as the system adjustment boards. Under the statute (Railway Labor Act, Sec. 3, First, (a)) the Adjustment Board is not selected or appointed by public authority, but consists of an equal number of members selected by "the carriers" and by "such labor organizations of the employes, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act."

Defendants are quite frank in disclosing their conception of the nature and operation of the Adjustment Board, saying:

> "Both in personnel and in organization this Board departs somewhat from traditional judicial concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are pre-disposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail." (Defendants' memorandum brief, page 20.)

An additional fact is pointed out by the defendants as follows:

> "A judge decides the case before him, while, as its name implies, this Board is intended to adjust

matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Defendants' memorandum brief, page 21.)

In view of these facts it is not surprising that the defendants insist that the National Railroad Adjustment Board does not act judicially (Defendants' memorandum brief, pages 54-70). They say:

> "Its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it" (Defendants' memorandum brief, page 65).

Again they say:

> "The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decisions which the Board is empowered to make in relation to a dispute before it.
>
> "The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decree are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption." (Defendants' memorandum brief, pages 66-67)

Nothing can be clearer from the passages hitherto quoted from the defendants' brief than their conception that it is not the function of the National Railroad Adjustment Board to adjudicate and declare existing legal rights but to substitute new arrangements between the parties in the light of what the Board considers as most conducive to their future "cordial" relationship.

A further contention of the defendants advanced at pages 36 and 37 of their brief would seem of special significance. There the defendants say:

"The Congressional plan . . . has as its cardinal principal that the parties should be given every inducement to agree upon a practicable settlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No legal compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

In short, the scheme of procedure established by the Railway Labor Act as conceived by defendants may be summarized as follows: first, that the parties to a dispute growing out of legal rights under a contract are remitted to a tribunal which is not judicial in character and where the success of one party or the other depends upon the ability of the party in question to obtain the assent of one or more members of the tribunal "whose natural predisposition is against him"; second, that the function of this tribunal is not to decide what are the present legal rights of the parties under their contract but to adjust the dispute if necessary by establishing new arrangements and relationships of a character which in the opinion of the tribunal will be best for the future relations of the parties; and, third, that after the tribunal has made a decision of the character just described, the primary sanction supporting the decision will be the "collective economic bargaining power of the employees," viz. their right to strike.

So construed, the Adjustment Board procedure requires the carrier to submit to have its contract rights replaced by new rights and obligations imposed by the absolute and unfettered discretion of the Board and invites the carrier to resist the imposition of these new rights and obligations only at the peril of bringing down upon its head the private forces implicit in a strike.

What the defendants are asking this court to hold in the instant case is that Congress has intended this procedure not as cumulative and ancillary to the jurisdiction of the courts but as a complete substitute therefor; in other words, as pointed out above, that Congress has intended to destroy the right to an adjudication of legal rights by way of the impartial judgment of judicial tribunals and to substitute therefor nothing

but the power of a bi-partisan board to create new rights and obligations at will which rest for their support primarily upon the private force involved in the right to strike.

If Congress has done this, then it has in effect destroyed all contracts and contract relations between the carriers and their employes, since a contract cannot be said to be legally a contract unless the rights under it are capable of being legally enforced and clearly a contract is not legally enforced by procedure which is avowedly aimed towards the substitution of new rights and obligations dictated by the tribunal for the old rights and obligations agreed to by the parties and embodied in their contract.

Clearly there should be reluctance to reach the conclusion that Congress has intended the Railway Labor Act to be construed in a sense which would necessarily raise the very grave constitutional difficulties implicit in the construction for which defendants contend (*United States* v. *D. & S. T. Ry. Co.*, 213 U. S. 366 ( )).

That there would seem to be no ground for such a construction is shown by the unanimous holdings of all the cases, both those decided subsequent to the Railway Labor Act and those decided during the period when boards were functioning under the Acts of 1920 and 1926, to the effect that the existence and jurisdiction of adjustment boards which may compromise and adjust future relationships does not oust the jurisdiction of the courts to declare and enforce existing rights.

E. *The analogy of the Interstate Commerce Act and the Packers and Stockyards Act lends no support to defendants' contention that the Railway Labor Act ousts the jurisdiction of the ordinary courts.*

Defendants apparently suggest in their memorandum brief at pages 35-36 and again at pages 61-64, that since in certain cases arising under the reparations provisions of the Interstate Commerce Act (Section 16) and the Packers and Stockyards Act, it has been held that the courts are without jurisdiction to entertain a suit for reparation, but that the procedure through administrative channels must be followed, and since the language of the Railway Labor Act is analogous to those provisions of the Interstate Commerce Act and the Packers and Stockyards Act, it follows that under the Railway Labor Act the procedure through the National Adjustment Board is exclusive and resort may not be had to the ordinary courts.

This argument is without merit for three reasons:

1. While it is true that in certain classes of cases under the reparations provisions of the Interstate Commerce Act it has been held that the remedy through the Commission is exclusive it has been held in other classes of cases arising under precisely the same language of the statute that the administrative remedy is not exclusive and that resort may be had in the first instance to the courts, which clearly indicates that the result in question does not flow from the statutory language and that therefore the analogy of that language to the language of the Railway Labor Act does not have the effect which defendants attribute to it.

2. Secondly, it is to be noted that the rights which are the subject matter of the instant controversy are

ordinary common law rights of contract not deriving from the Railway Labor Act or any other statute, while, on the contrary, the rights at issue under the Interstate Commerce Act and the Packers and Stockyards Act are rights which flow from the statute itself, with the result that under the general rule already stated the statutory remedy provided for the enforcement of those rights is held to be exclusive.

3. In the third place and finally, if the functions and purpose of the Railroad Adjustment Board are conceived to be as they are described by the defendants and discussed in the immediately preceding section of this brief (pages 31-35, *supra*), they present differences so marked from the quasi judicial characteristics of the Interstate Commerce Commission and of the Department of Agriculture under the Packers and Stockyards Act that no analogy can be drawn between the two.

As to each of these points in turn:

1. The rule that in certain classes of cases under the reparations provisions of the Interstate Commerce Act the remedy through the Commission is exclusive and that the courts are without jurisdiction to entertain an independent proceeding derives from *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) where a shipper, without first proceeding before the Commission, brought suit to recover from a carrier the amount by which he claimed that certain rates which he had been compelled to pay were unjust, discriminatory and unduly preferential. The Supreme Court held that such a suit would not lie because the purpose of the Interstate Commerce Act was to maintain uniformity and prevent discrimination in rates, and that this result would be directly defeated if separate juries

in individual cases were to be entitled to say what was a reasonable rate, thereby destroying the uniformity which the Act sought to establish by forbidding carriers to depart from the rate published in their tariffs and filed with the Commission. The court also pointed out that the right to a reasonable and non-discriminatory rate in its present form derives from the Act to regulate commerce, in view of the doubt as to the existence and scope of such a right at common law before the Act to regulate commerce was enacted (page 439).

Subsequent to the decision in the *Abilene Oil Co.* case, it was contended that under the rule there laid down a shipper was no longer in any case free to institute an original proceeding in the courts to recover charges alleged to have been improperly exacted by a carrier without having first applied to the Commission. This contention was advanced in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), where a shipper sued a carrier to recover an amount alleged to have been exacted in violation of the carrier's tariff. The case turned wholly on the proper interpretation of the tariff and to that extent upon whether or not the carrier had complied with the provisions of the Interstate Commerce Act in charging a rate different from its duly published rate. The Supreme Court held that the action might be maintained and that it was not necessary for the shipper to seek his remedy through the Commission. The court distinguished the cases falling within the rule of the *Abilene Oil Co.* decision by narrowing the application of that rule to controversies over the alleged unreasonable and discriminatory character of a rate, as to which separate decisions by the courts in individual controversies could not avoid the result of destroying the uniformity of rates which it was the purpose of the Act to

establish. Here, on the other hand, the controversy was essentially as to the proper construction of a contract. It was therefore held that preliminary resort to the Commission was unnecessary since such construction was not a matter calling for uniformity of decisions or for the exercise of administrative discretion.

It may be noted in passing that in the instant case, as in the case just cited, the issue is also solely as to the construction of a contract and since under the language of the Interstate Commerce Act controversies of this character may form the basis of an original application to the courts without preliminary resort to administrative determination, it seems clearly to follow that the use of analogous language in the Railway Labor Act requires a similar result.

2. It was noted above that the Supreme Court in its opinion in the *Abilene Oil Co.* case pointed out that at the time of the enactment of the Act to regulate commerce the right of a shipper to recover at common law for discrimination in the rates which he was charged by a carrier was doubtful and uncertain, and that this right was established by the Commerce Act. In the subsequent case of *Mitchell Coal Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 247 (1913), where the rule of the *Abilene Oil Co.* case was followed, the Supreme Court said:

> "It is urged that a claim based upon the unreasonableness of past rates raises a judicial question of which the courts and not the Commission have jurisdiction. There are several answers to this proposition. In the first place, the plaintiff cannot claim under the Act and against it. To say the least, it is extremely doubtful whether at common law one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered

> to th carrier. (sic) But if any such right existed, it was abrogated or forbidden by the Commerce Act, and one was given which as a condition of the right to recover required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or an undue preference."

From this language, it seems entirely clear that the effect of the Act to regulate commerce was to abolish certain pre-existing common law rights if such in fact existed, and to establish in lieu thereof new rights originating from the Act and which therefore under the rule stated above at pages 12-17 must be enforced according to the procedure prescribed by the Statute establishing them. As already emphasized no such situation exists in the instant case. Here the plaintiff is not seeking to enforce rights derived from the Railway Labor Act, but on the contrary to obtain a judicial declaration of rights arising under a contract at common law. Clearly, therefore, if the decisions under the Commerce Act are relevant, the instant case falls within the class of controversies covered by *Great Northern Railway Co.* v. *Merchants Elevator Co., supra,* rather than under the cases governed by the *Abilene Oil Co.* decision.

3. Finally, if the defendants' exposition of the character and function of the National Railroad Adjustment Board discussed above at pages 27-35 is assumed for purposes of argument to be correct, it establishes the widest possible distinction between that agency, its composition, procedure and purposes on the one hand, and a quasi-judicial administrative tribunal, like the Interstate Commerce Commission, on the other, which in reparation proceedings acts for the purpose of determining the rights of the parties before it and

not for the purpose of re-adjusting their rights as the defendants claim it is the function of the National Railroad Adjustment Board to do. There is, of course, further difference in respect of the form of procedure followed by the two agencies. The Interstate Commerce Commission in reparation proceedings acts only after notice and hearing and is required by statute and court decisions to take testimony, permit cross-examination and arrive at a judicial determination. On the other hand, the procedure of the Adjustment Board, as described in the allegations of plaintiff's complaint, paragraphs 20-27, inclusive, is totally wanting in all the requirements of a judicial hearing. See especially Exhibit "E" to the Complaint. It seems entirely clear that a body acting under the non-judicial procedure there described cannot be regarded as in any way entitled to hold the same place or perform the same functions in respect of the adjudication of rights as that which is held by the Interstate Commerce Commission in the class of cases represented by the *Abilene Oil Co.* decision.

II.

PLAINTIFF IS NOT PRECLUDED FROM MAINTAINING THIS SUIT BY REASON OF THE FACT THAT THE ISSUES INVOLVED IN THE PRESENT CONTROVERSY HAVE BEEN SUBMITTED TO THE NATIONAL RAILROAD ADJUSTMENT BOARD BY A LABOR ORGANIZATION REPRESENTING THE DEFENDANTS AND THAT AS A RESULT OF SUCH SUBMISSION THE BOARD HAS MADE A PURPORTED AWARD AND ORDER THEREON.

Defendants contend that this court is without jurisdiction to render a declaratory judgment in the instant case because to do so would, according to their contention, amount to a "review" of the award previously

handed down by the National Railroad Adjustment Board (for the "award" see Complaint, paragraphs 26, 27), and they urge that "a declaratory judgment will not be granted as a means of reviewing the decision of another tribunal" (Defendants' memorandum brief, page 45). In support of this contention, defendants cite (pages 46-48) cases holding that under the Declaratory Judgments Act proceedings may not be maintained for a declaration of rights already adjudicated by another judicial court of co-ordinate jurisdiction.

Plainly there is inconsistency between this contention and the contention of the defendants already considered that not merely is the National Railroad Adjustment Board not a court, but that it does not act judicially or even act to adjudicate rights. If the view of defendants is sound as to the function of the Adjustment Board and the nature of its action in adjusting disputes by the substitution of new rights and obligations for existing ones, then it seems clear that its awards are not judgments or adjudications of right in such sense as to bring them within the protection of the rule that rights already adjudicated will not subsequently be re-examined in declaratory judgment proceedings.

Assuming, however, that the defendants are in error in their view of the nature and functions of the Adjustment Board, and that it is in fact required by Section 3(i) of the Railway Labor Act to base its awards upon the existing contract rights of the parties, it by no means follows that the bare fact of its having made such an award precludes those rights from being examined in a proper case in the course of a proceeding in the ordinary judicial courts, including a proceeding for a declaratory judgment.

This follows, first, from the nature and character of awards by the Adjustment Board; secondly, from the relation in which the instant proceeding stands to the award here involved; third, from what the Adjustment Board attempted to do by that award; fourth, from the nature of the Adjustment Board as a tribunal; and, fifth, from the procedure followed by the Board in arriving at its award.

1. With regard to the nature and character of awards and orders of the Adjustment Board, defendants not merely admit but assert (Memorandum brief, page 53) that "the order has no substantive effect and is in itself unenforceable." They further assert (page 54) that "the order establishes no rights"; and also (page 53) that "the plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued." Again they say (page 70) that "the power to enter binding decrees and orders" is "a power not possessed by the National Railroad Adjustment Board." Defendants find a basis for these contentions (Memorandum brief, page 53) in the fact that under Section 3(p) of the Railway Labor Act, in a suit brought by the employes, the order or award has no further effect than as "prima facie evidence of the facts therein stated." This conclusion would appear to be sound, and defendants are accordingly correct in stating that the existence of the order merely assists the party in whose favor the order was issued to prepare and prove his case in court if he should elect to bring an action against the carrier under Section 3(p) of the Act. An order or award of this character having only evidentiary effect is obviously not such a determination of rights as to come within the protection of the rule that

the declaratory judgment procedure is not available to examine rights which have already been determined by another court of competent jurisdiction. Such determination by another court must clearly be a final determination operating to declare and fix the rights of the parties, and not a mere declaration capable of being used as evidence in the event that a suit should at some time be brought by one of the parties. The lack of final and compulsive effect in the awards of the Adjustment Board, and the fact that under the statute they are intended as merely preparatory to private proceedings which may be brought by one of the parties in his discretion, serve to differentiate them from the entire class of administrative orders and determinations, like rate-fixing orders of the Interstate Commerce Commission and cease-and-desist orders of the Federal Trade Commission, which have an immediate and coercive effect in fixing the subsequent rights and powers of persons subject to the regulatory statute which authorizes the order.

2. In the second place, it is to be noted that the present proceeding is not one for review of the award of the Adjustment Board. As already pointed out, and as admitted by the defendants, this is a proceeding for a declaration of the contract rights of the parties under their agreement of 1923 and the award is involved only incidentally. Neither plaintiff nor defendants (see defendants' memorandum brief, pages 53-54) claim or assert any rights under the award. The award is recited in plaintiff's complaint for the two-fold reason of making full disclosure to this court and because it has operated as a factor in the demands for money payments now being made upon the plaintiff by the defendants. While the award of the Adjustment Board does

not create or affect the rights in controversy, and while it might, therefore, have been ignored in the pleadings, it is nevertheless true that the fact of its having been made has stimulated and is stimulating the demands made by defendants which plaintiff seeks in this proceeding to have adjudicated.

If, as both plaintiff and defendants contend, the award is not the source of the rights before this court for adjudication and has not legally affected those rights, it seems clear that the plaintiff's right to maintain the instant proceeding is not in any way affected by the effect which a decision here may have upon the award. The fact that the award is involved in such a way that a decision in this proceeding may be said to amount to a "review" of the award is without significance, and accordingly defendants' contention that a declaratory judgment will not be granted as a means of reviewing the decision of another tribunal is without merit, even assuming that the Board of Adjustment is a "tribunal" within the meaning of the principle relied on.

However, if both plaintiff and defendants are wrong in the view they take of the nature and effect of an award by the Adjustment Board, and even if that award amounts to an attempted adjudication by the Board of the contract rights of the parties, it is nevertheless within the jurisdiction of this court to entertain the instant proceeding because in that event, on the case made out by the complaint, the purported award of the Board must be disregarded as void and of no effect since it exceeds the statutory authority of the Board.

3. It appears from the complaint that what the Adjustment Board attempted to do by its award was not

to construe and apply the existing contract between the parties, but rather, in the words of the defendants' memorandum brief (page 67), "to adjust the dispute in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction," or, in other words, in a manner which in the arbitrary opinion of the Board was likely to be conducive to that end. If, as defendants contend, the Board in making a decision of this character was acting within its statutory power, then, as defendants admit, its decision was not an adjudication and there is no possible objection to the adjudication of the parties' rights in the present proceeding on the ground that a decision here would amount to a review of a prior adjudication. If, on the other hand, it was not within the statutory power of the Board to go beyond an adjudication of the contract rights of the parties and to substitute for such adjudication an adjustment of future rights and obligations in its own discretion, then the Board by making the award which it has made and thereby imposing a new contract on the parties has plainly exceeded its statutory power with the result that its award is void and under well settled principles of law may be disregarded in the present proceeding.

There is no more fundamental principle of our legal system than that administrative decisions which affect private rights must be subject to re-examination in a judicial court for error of law. In the words of Mr. Justice Brandeis in a recent case:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied [by an administrative tribunal]" (*St. Josephs Stockyards Co.* v. *United States*, 298 U. S. 38, 56 Sup. Ct. 720 (1936), at 84).

This is particularly true where the error of law goes to the jurisdiction of the administrative body and hence to its power to act. If an administrative body were to be immune from judicial examination of its decisions of legal questions, it could obviously by erroneous decisions of such questions arrogate to itself powers of action not committed by the statute which is the sole source of its authority. To prevent such a result and provide a means of properly confining administrative action within the limits to which it was meant to be confined by the legislature, the courts have always permitted judicial re-examination of administrative decisions on those points of law as to which an erroneous decision by the administrative agency might result in expanding the authority of the agency beyond the limits prescribed for it by the legislature.

If the award of the Adjustment Board should be held by this court, contrary to the contention of both plaintiff and defendants, to be an administrative determination judicial in character, and if by that determination the Board has so construed the Railway Labor Act as to permit it to impose a new contract on the parties or has so misconstrued the legal effect of the contract between the parties as to convert it into a new contract, then the Board has plainly exceeded the powers conferred upon it by Congress and the plaintiff is entitled to a judicial examination of the issues made by the complaint to determine whether the Board has done so.

Among the many cases illustrating this principle, three may be selected for example.

In *Gegiow* v. *Uhl*, 239 U. S. 3 (1915), the Secretary of Labor was authorized by statute to exclude immi-

grants who were likely to become public charges. The Secretary excluded the petitioners on the ground that they were destined for Portland, Oregon, a place where the labor market was over-stocked and where it would be impossible for them to obtain employment. The Supreme Court held the immigrants entitled to enter on the ground that an alien is not likely to become a public charge within the meaning of the statute merely because the labor market in the city of his immediate destination is overstocked. The statute made the decision of the immigration officials conclusive upon matters of fact. The court held, that this conclusiveness did not attach to a construction of law wherein the error of the officials might result in their exercising authority to exclude persons lawfully entitled to enter the United States.

Again, in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911), the Commission refused to permit a carrier to increase certain rates on the ground that to do so would adversely affect the lumber industry of the Willamette Valley, although there was no other ground for holding the increased rate unreasonable. The carrier attacked the rate, contending, in the words of the Supreme Court, that "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of re-

viewing and correcting an abuse of power" (Opinion, page 443). The Supreme Court held the order invalid, saying that "it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time, to a just and reasonable charge for the service rendered for the future" (Opinion, page 449).

In *Waite* v. *Macy*, 246 U. S. 606 (1918), the United States Tea Board had statutory authority to exclude tea inferior to certain standards. The court excluded certain tea containing a minute percentage of coloring matter admitted to be harmless in character although the standard permitted a much greater amount of other impurities. The importer claimed that by this action the Board was attempting to apply criteria outside of those prescribed by law. The Supreme Court sustained an injunction against the Board, saying in an opinion by Mr. Justice Holmes:

> "No doubt it is true that this court cannot displace the judgment of the Board in any matter within its jurisdiction, but it is equally true that the Board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption" (Opinion, pages 608-609).

Statutory procedure is generally provided for the review of administrative determinations which affect private interests. The absence of such procedure, however, is no bar to review where necessary to restrain administrative authority within its proper bounds, and where no procedure is provided it will be devised by

the courts. The most recent illustration is *Shields* v. *Utah-Idaho Central R. R. Co.*, decided by the Supreme Court, December 5, 1938 (59 Supreme Court Reporter, Advance Sheets, page 160). There the Interstate Commerce Commission had purported to exercise authority granted it by statute to determine whether any railway line operated by electric power was an interurban electric railway exempted from the operation of the Railway Labor Act. The Supreme Court had previously held that such a determination by the Commission was not within the statutory review procedure provided by the Urgent Deficiencies Act of October 22, 1913 (*Shannahan* v. *United States*, 303 U. S. 596). The court went on to say:

> "We have not held that the determination of the Commission was not subject to judicial review by other procedure. . . . The nature of the determination points to the propriety of judicial review. . . . Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted even though the complaint seeks to enjoin the bringing of criminal actions. . . . In the circumstances we think respondent was entitled to resort to equity to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status."

For other cases to the same effect, see *United States* v. *Griffin*, 303 U. S. 226, 58 Sup. Ct. 601 (1938); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908).

Where essential to protect against usurpation of administrative power in excess of statutory authority arising out of administrative error with respect to questions of law, the review may take place in a collateral proceeding in spite of the general rule that col-

lateral attack is not permissible against judgments of a tribunal acting properly within its jurisdiction. The *Shields Case*, cited above, is squarely in point. There the challenged determination had been made by the Interstate Commerce Commission. The effect of the determination, however, was to bring into play certain provisions of the Railway Labor Act administered by the so-called Mediation Board. Disobedience of these provisions was made punishable at the suit of the appropriate United States District Attorney. The plaintiff accordingly brought its bill against the District Attorney although the point in issue was the validity of a determination by the Interstate Commerce Commission. The effect of the proceeding was accordingly to attack the Commission's determination collaterally. But so little was this held to constitute a bar to the action that the point was not even raised. The court squarely held that the determination of the Commission was appropriately subject to review in the form of proceeding adopted.

Collateral attack has been the usual and not the exceptional method of reviewing determinations of the United States Land Office whereby as a result of error of law the land officials have patented to one party land which lawfully belonged to another. In such cases, the issue of title has been tried in ejectment proceedings between the parties. See *Burfenning* v. *Chicago, St. Paul, Minn. & Omaha R. Co.*, 163 U. S. 321 (1896).

In the case at bar no review procedure is provided for awards of the Railroad Adjustment Board. Defendants correctly assert that the statutory suit which employes are authorized to bring under Section 3(p) of the Railway Labor Act is not a review proceeding since under the statute the award has no further effect than

as *prima facie* evidence of facts and the suit is upon the employe's rights under his contract. Accordingly, if the award has any standing at all as the determination of an administrative tribunal so as to raise any issue of review in the instant proceeding, it is a determination for which no statutory review is provided and which accordingly stands in substantially the same position as the determination of the Interstate Commerce Commission in the *Shields Case, supra.* In that case the Supreme Court upheld a form of procedure specially devised for no other purpose than to make a collateral attack upon the determination.

In the instant case, plaintiff seeks to employ a regular and normal form of procedure in a type of case for which that procedure is intended, viz., the interpretation of contract rights. There would be no question as to its propriety, in the absence of the Adjustment Board's award. Defendants contend, however, that plaintiff is barred from the use of this otherwise appropriate form of procedure simply because its use would affect the award collaterally. It seems clear that this argument is without merit in the light of the decision in the *Shields Case, supra,* that a proceeding may be maintained for the express purpose of making a collateral attack upon an administrative determination.

4. In all that has so far been said, it has been assumed that the National Railroad Adjustment Board is a tribunal of the class whose determinations and orders if of a properly judicial character come within the rule that they may not subsequently be re-examined if made within the tribunal's statutory jurisdiction. The tribunals to which this principle has been hitherto applied have always been and must necessarily be official governmental bodies like the Interstate Commerce

Commission, the Federal Trade Commission, the General Land Office, and the like. The National Railroad Adjustment Board by its composition differs essentially from such a tribunal. Attention has already been called to the fact that its members are appointed not by public governmental authority but by private agencies, viz., the carriers and the labor organizations (Section 3, First, (a), see *supra* page 31). The Railway Labor Act provides that the carriers, each acting through its board of directors or its receiver or trustee, or through an officer designated for that purpose by such board, receiver or trustee, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board. Similarly, the national labor organizations, acting each through the chief executive or other medium designated by the organization, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected, and shall select such members (Section 3, First, (b) and (c)). Furthermore, the members of the Adjustment Board are not paid out of the public Treasury. "Each member of the Adjustment Board shall be compensated by the party or parties he is to represent" (Section 3, First, (g)). Surely this is an altogether different type of agency from a public regulatory body like the Interstate Commerce Commission. The question may at once be raised whether it would be within the constitutional power of Congress to confer on a body designated and compensated by those subject to its jurisdiction any authority to render legally binding adjudication as to rights.

The point would seem to be fully covered by what the Supreme Court has said in *Carter* v. *Carter Coal*

Co., 298 U. S. 238, 56 Sup. Ct. 855 (1936), at 311-312, although there the court was speaking of the delegation of quasi-legislative rather than quasi-judicial powers to the representatives of private interests. The court said:

> "The effect . . . is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act . . . The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is . . . delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."

Clearly, these considerations apply to the exercise of judicial no less than of legislative power and would operate to render unconstitutional any attempt by Congress to vest the determinations of the National Railroad Adjustment Board with the degree of conclusiveness against attack in the courts which is enjoyed by determinations of such bodies as the Interstate Commerce Commission, the Federal Trade Commission, and the Utilities Commissions and Workmen's Compensation Boards of the States.

5. Lastly, the National Railroad Adjustment Board because of the procedure under which it acts is not entitled to be regarded as a tribunal whose adjudications may not be subsequently re-examined in the judicial

courts. That procedure as applied in the proceeding before the Board which resulted in the award involved in the instant case is fully described in paragraphs 19-27, inclusive, of the complaint. It is there stated that representatives of the plaintiff's employes, including the defendants, invited the plaintiff to join with them in the submission of their claim to the National Railroad Adjustment Board, which plaintiff declined to do on the ground that said claim amounted to a demand that operating practices should be abandoned which had existed continuously since the commencement of operation of the Terminal and that said claim was not based on any violation of any agreement. Thereafter, the representatives of the employes filed a claim with the National Railroad Adjustment Board, First Division, and the Board notified the plaintiff to file its answer within thirty days and set a date for the appearance of the plaintiff and representatives of the employes. On said date, when representatives of the plaintiff and the employes appeared before the Board at Chicago, no witnesses were called to testify, no evidence was produced of the facts relied on by the representatives of the employes to support their claim, but ex parte statements were made and received by the Board without any opportunity for cross-examination to test the competence of the statements. This was in accord with the established procedure of the Board. That procedure affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence, and since no evidence is introduced there is no opportunity for cross-examination. No record, stenographic or otherwise, is made of the "hearing." Exhibit "F" to the complaint sets forth resolutions of the Board to the effect that when a claim has been filed, the other

party is required to answer without seeing the submission of his adversary which includes the statement of claim, and also to the effect that after the two submissions have been filed, neither party may add anything thereto prior to the date of hearing and may not at the hearing present any matters not incorporated in the submissions. Attention is called especially to the following sentence from the resolution of April 27, 1937:

> "Introduction of evidence at the hearing is foreclosed" (Complaint, page 42).

It should at once be clear how completely this procedure is wanting in the requirements of a quasi-judicial hearing.

In the first place, the party who is called upon to answer is not permitted to see the submission which contains the statement of the claim which he is to answer.

In the second place, no evidence is permitted to be introduced at the hearing.

If the matters stated in the submissions are to be regarded as evidence, no opportunity is given to cross-examine or otherwise test such evidence. The resolutions of the Board require that the answering submission must be filed before the defendant sees the submission of his adversary.

Furthermore, in cases in which, as in the one here involved, the Board is unable to reach its own decision but refers the case to a referee, not merely does the referee hear no evidence and have before him no evidence save the "submissions" of the parties, but he does not hear argument by the parties or even receive written argument from the parties. The only argument which he hears is argument which the two factions of the Board, viz. the employer's representatives

and the employes' representatives, may care to place before him (Complaint, paragraph 25).

In the words of the defendants' memorandum brief (page 21): "If the regular members are unable to reach an agreement a neutral referee is called in to sit and vote with them for the purpose of breaking the deadlock. If such referee is selected, the Board then adopts a quasi-judicial formula of procedure. The members then become adversaries indeed and actively urge their respective views upon the referee to whom their differences are, in effect, submitted for decision."

Attention should be called to the wide differences between the method of the procedure above described and the requirements of judicial procedure as carefully outlined in a recent opinion of the Supreme Court.

In *Morgan* v. *United States*, 298 U. S. 468, 56 Sup. Ct. 906 (1936), at 480, the court said:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . . A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.

> The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

In the light of the requirements thus laid down, it seems plain that the proceedings before the National Railroad Adjustment Board cannot lay claim to be quasi-judicial proceedings in any sense, and if they are not, it follows that an award or decision purporting to be a determination of legal rights as a result of such procedure is not within the rule that rights may not be re-examined in court which have already been determined by a tribunal of competent jurisdiction.

III.

Defendants and Others Occupying a Like Situation Will Not be Deprived of any Legal Rights if it is Held That a Proceeding for a Declaratory Judgment Will Lie in the Instant Case; Whereas if Plaintiff is Denied Relief by Way of the Declaratory Judgment Procedure, it Will be Wholly Deprived of Judicial Protection of Its Contract Rights and Exposed to Serious and Increasing Hardships and Losses.

Defendants in their memorandum brief (pages 37-43) take the position that if plaintiff is permitted to maintain the present suit, defendants will be deprived

of certain rights which are assured to them by law. This proposition is sought to be established in the following manner:

Defendants in the first place assume that the ordinary jurisdiction of the courts at law and in equity is ousted by the special procedure set up under the Railway Labor Act. The error in this contention has already been pointed out above under the first main heading of this brief, pages 6-41. Assuming, however, for the purpose of argument that the defendants' contention is sound in this respect, it follows that under the procedure of the Railway Labor Act access to the courts can only be obtained under Section 3 (p) of the Act. That section, as already noted, provides that if a claim of an employe has been sustained by the National Railroad Adjustment Board the employe may then bring a suit on the claim in a Federal District Court for the district in which he resides, or in which is located the principal office of the carrier, or through which the carrier operates. It is further provided that such a suit may be brought at any time within two years from the date of the award of the Adjustment Board (Section 3, First, (q)). In such a suit the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal, but such costs shall be paid out of the appropriation for the expenses of the Courts of the United States. If the petitioner shall finally prevail, he shall be allowed a reasonable attorneys fee to be taxed and collected as part of the costs of the suit (Section 3, First, (p)).

Defendants contend that if in fact the ordinary jurisdiction of the courts is not ousted by the procedure under the Railway Labor Act the defendants will be

deprived of the special legal advantages under the provisions of the Act just recited accruing to employes whose claim has been sustained by the Adjustment Board, viz.:

1. The advantage of a right of selection of the forum in which the suit is to be brought as between the relatively wide range of districts specified in the Act;

2. The advantage of waiting for an interval of two years before the case is submitted to a court;

3. The advantage of not having to pay costs in the district court if they lose; and

4. The advantage of recovering attorneys fees if they win.

Defendants contend that if it is held that a proceeding like the present may be maintained under the general jurisdiction of the courts employes whose claims are sustained by the Adjustment Board will be deprived of the foregoing advantages.

If this contention is sound it would operate to exclude the declaratory judgment procedure not merely in a case like the present but in a large number of other cases to which it is admittedly applicable.

Take, for example, in the first place, the matter of the selection of a forum. Suppose that A, a resident of State X, has a contract with B, a resident of State Y, and makes a claim under the contract against B which B does not admit, so that a controversy arises. Under the Federal venue statute (Judicial Code, Paragraph 51, 28 U. S. C. A., Paragraph 112) A has an election to sue B in the District Court of either State X or State Y. Since A fails to sue, B brings a proceeding for a declaratory judgment of his rights

under the contract in the District Court of State X. B by bringing the proceeding necessarily selects the forum and to that extent deprives A of the right of selection which A would have in the event that A were plaintiff. Thus necessarily the Declaratory Judgments Act by empowering one who would be a defendant at the suit of A to put himself in the position of a plaintiff cuts off the right of electing the forum which would otherwise accrue to A as plaintiff. If this is an objection to the applicability of the declaratory judgment procedure, it must apply to that procedure generally, and if it does not apply to that procedure generally, then defendants here cannot take advantage of it by reason of the special venue provisions of the Railway Labor Act unless the remedy by way of the Railway Labor Act has been expressly made exclusive by Congress, in which event there would be no necessity to resort to the objection in question.

The same thing is true with regard to the statute of limitations. Defendants take the position that because by Section 3, First, (q) of the Railway Labor Act, an employe whose claim has been sustained by the Adjustment Board has two years within which to bring the statutory proceeding in a district court provided for by Section 3, First, (p), he is protected and guaranteed against a proceeding in court for a two-year period. To construe statutes of limitations in this way as guarantees of freedom from litigation would obviously destroy the declaratory judgment procedure altogether. If, for example, A makes a claim on a written instrument against B of such character that A would have six years within which to bring action against B, and B, to set the claim at rest, brings a declaratory judgment proceeding within six months, B has clearly forced A into court more than five years

before A might have chosen to come on his own initiative. If the six-year statute of limitations guarantees A a right to stay out of court for that entire period and still insist on his legal rights, it is clear that B's action in bringing the declaratory judgment deprives A of this right. Clearly this is not the law. If it were the law, a potential plaintiff could always prevent a potential defendant from protecting himself by application for a declaratory judgment.

With respect to the relief of the defendants from costs and with respect to their rights to attorneys fees in the statutory proceeding under Section 3, First, (p), the right of the plaintiff to maintain the present suit cannot be construed as in any sense an interference. If the defendants had chosen to bring a statutory suit under Section 3, First, (p), they would have been entitled to all the benefits conferred by that section with respect to costs and attorneys fees. The right of a potential defendant to bring a proceeding for a declaratory judgment in no way destroys the right of the potential plaintiff to sue in whatever forms of action are available to him. It merely operates to make the potential plaintiff make up his mind more quickly. If he does not do so and the potential defendant anticipates him with a suit for a declaratory judgment, this is no valid objection to the declaratory judgment procedure, or that procedure would be unlawful in *toto*. Every time that a complaint for a declaratory judgment is filed it necessarily cuts off the special advantages which the defendant in the declaratory judgment procedure might have obtained by acting first and suing as plaintiff.

It is also of the essence of the declaratory judgment procedure, as already pointed out, to deprive a poten-

tial plaintiff of whatever special advantages he might seek to obtain by resting inactive upon his rights and thereby continuing to embarrass the defendant. The purpose of the declaratory judgment procedure is to make it possible for the defendant to relieve himself from such embarrassment. Necessarily to do so restricts the power of the potential plaintiff to embarrass the defendant and in the last analysis this is the complaint of the defendants in the instant case. As they construe the Railway Labor Act, it confers upon them certain powers of embarrassment. As they put it, "it makes resort to the courts unattractive to the carriers" (Defendants' memorandum brief, page 38),—in the first place, by closing the doors to the carriers altogether for review of an unfavorable award by the Adjustment Board and, secondly, by giving to the employes an option of waiting two years to sue the carrier if they wish to sue at all, and in the meanwhile resorting to what the defendants call their "collective economic bargaining power" (Defendants' memorandum brief, page 37), which means their threat to strike. If, as defendants contend, the statutory procedure which is characterized by these results is exclusive, it follows that the carriers are effectively deprived of recourse to the courts for the protection of their contract rights.

In short, the scheme of procedure which defendants contend has been established by law as a result of the Railway Labor Act is nothing else than this: if a carrier has a contract with a group of employes and if thereafter the employes make claims which are not supported by the contract, the employes can against the will of the carrier take the case to the National Railroad Adjustment Board. The Adjustment Board is

then free either to dictate by way of adjustment a new contract for the parties as defendants contend, or else at least in the guise of construing the contract to do so in such a way as in effect to write a new contract. After it has done this by its award, the courts are closed to the carrier and the employes may wait two years before electing to come into court if they ever elect to do so at all. In the meantime, with an outstanding award of the Adjustment Board in their favor, they are in a position to use against the carrier their "collective economic bargaining power" and thereby place the carrier in the position of resisting what purports to be a lawful award by a publicly constituted body. The whole objective of the scheme as outlined in the defendants' memorandum brief is clearly to eliminate effective resort to the courts for the determination of legal rights under contracts between carriers and their employees. If the scheme is as defendants contend an exclusive one, plaintiff submits that it is destructive of the contract rights of the carriers. Defendants apparently argue that the scheme should be held to be exclusive in order to preserve and protect those very features of it which would enable it to destroy the rights of the plaintiff under its contracts. Plaintiff submits that this argument is without merit. It consists of constructing on a hypothetical basis a scheme of procedure which would be grossly unfair and inequitable and then arguing that in order to safeguard and maintain this inequitable procedure the plaintiff should be denied its rights of resort to the judicial courts under the Declaratory Judgment procedure to which it is plainly entitled under all the decided cases and under the principles which they em-

body as pointed out in the two first sections of this brief.

Not merely would the defendants not be deprived of any legal right to which they are entitled if it is held that this proceeding for a declaratory judgment may be maintained but, on the contrary, if it is not so held, the plaintiff will be clearly deprived of a judicial remedy on its contracts with its employees and, in effect, those contracts will be reduced to mere scraps of paper

Aside from the immediate embarrassment to which plaintiff is being daily subjected by the accrual of demands for penalty payments by the defendants, as set out in paragraph 29 of its complaint, it would also in practical effect be denied the opportunity of having determined, once and for all, whether its duties under the agreement of 1923 are as a matter of law what it claims they are, or whether they are the different and additional duties which have been imposed by the award of the Adjustment Board, and on the basis of which the demands for money payments now being made by the defendants are put forward. It seems entirely clear from defendants' brief that they have no intention of bringing that question to a judicial determination and that in fact they conceive the purpose of the Railway Labor Act to prevent the adjudication of such questions in the court. Their brief is rich in expressions of suspicion and dislike of court procedure. They say:

> " * * * It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment

of cordial relationships between the parties in the future." (Defendants' memorandum brief, pages 66 to 67)

They further say, speaking of a procedure under which the employers would be entitled to resort to court:

> "* * * the employees would go before the Board with everything to lose and absolutely nothing to gain. It can hardly be doubted that the result would be an increasing unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes. * * *" (Defendants' memorandum brief, page 43)

On the other hand, as already pointed out, they take the position:

> "* * * The orders of the Board find their primary sanction in the collective economic bargaining power of the employes. * * *" (Defendants' memorandum brief, page 37)

Reading these statements together they apparently mean that the employes will consent to go before the Board if it is understood that they are in a position to enforce the orders of the Board by their right to strike; but that if, on the other hand, a way is open through the courts to obtain a judicial determination of the rights of the carriers as well as of the employes, then the employes will not go before the Board at all, but will resort to the right to strike in the first instance. This amounts to saying that in either instance; *i. e.*, whether the procedure before the Board is or is not resorted to, the employes insist that their claims against the carriers, whether founded in contract or not, extend

exactly so far as their collective economic bargaining power can make them extend. If that view is accepted, it follows that contracts between carriers and employes mean only what the collective economic bargaining power of the employes can make them mean. On that view such contracts are scraps of paper.

Plaintiff submits that its right to maintain the present action can only be denied by acceptance of the theory that contracts between a carrier and its employes are not, in contemplation of law, contracts at all. If this action will not lie plaintiff will be denied whatever rights and advantages it may have under the agreement of 1923. If, in law, it is entitled to any rights and advantages under that agreement, its right to maintain the present proceeding must be sustained.

Respectfully submitted,

SYDNEY R. PRINCE, JR.,
15th & K Streets, N. W.,
Washington, D. C.

GUY W. KNIGHT,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.

JOHN DICKINSON,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.
Attorneys for Plaintiff.

Washington, D. C.
April 11, 1939.

Service on defendants of the foregoing Points and Authorities this 11th day of April, 1939, is hereby acknowledged.

William E Willis

.....

FRANK L. MULHOLLAND,
WILLIAM E. WILLIS,
Attorneys for Defendants.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

vs.

F. E. BOSWELL ET AL., *Defendants.*

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

Filed May 11, 1939

FRANK L. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,
CLARENCE M. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,
WILLARD H. McEWEN,
1041 Nicholas Bldg., Toledo, Ohio,
HAROLD C. HEISS,
Keith Bldg., Cleveland, Ohio,
RUSSELL B. DAY,
Keith Bldg., Cleveland, Ohio,
WILLIAM E. WILLIS,
Kellogg Bldg., Washington, D. C.,
Attorneys for Defendants.

INDEX

Page

General Appraisal of Plaintiff's Memorandum of Points and Authorities 1

Reply Argument 3

I. The effect of the special procedure provided by the Railway Labor Act upon the court's jurisdiction to grant a Declaratory Judgment... 3

II. The right of the court to grant a Declaratory Judgment as a means of judicial review of administrative orders 11

III. The effect of the granting of such judgment upon the rights of the parties..... 18

Summary 20

CASES CITED

Lane vs. Union Terminal Co., 12 Fed. Supp. 204..... 5

Nord vs. Griffin, 86 Fed. (2) 481..... 5

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GENERAL APPRAISAL OF PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

Before replying to the arguments contained in the plaintiff's memorandum it is well to note the effect of this memorandum in narrowing the issues of the case. In its complaint the plaintiff indicated that it might assert that the Railway Labor Act embodied an un-

constitutional delegation of judicial power to the National Railroad Adjustment Board. Accordingly a considerable portion of the defendants' original memorandum brief was devoted to a consideration of that question. By its failure to answer this argument in its own memorandum, we conclude that the plaintiff has abandoned the point. Further, in our original memorandum we argued that if the complaint stated no cause of action for declaratory judgment, it stated no cause of action at all. This is conceded by the plaintiff on page 1 of its memorandum, and accordingly no longer forms an issue in the case.

It appears, therefcre, that the determination of this case depends on the single issue of the propriety of granting relief by declaratory judgment. In our principal brief we presented to the court three reasons why this is not a case appropriate for such relief. These reasons as they were stated are as follows:

I. A Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

II. A Declaratory Judgment will not be granted as a means of reviewing the decision of another tribunal.

III. A Declalatory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

In its answer brief plaintiff has revealed a misapprehension of the nature of these arguments. This misapprehension has been so complete as to have led the plaintiff to repeatedly attribute to the defendants' admissions, arguments and statements of position

which, were they to be allowed to pass unchallenged, might well give rise to a distorted view of the defendants' case.

In addition to this misapprehension, or perhaps because of it, the plaintiff's memorandum fails in large measure to even meet the defendants' arguments, and certainly fails to answer them. The plaintiff's principal contentions relative to the question of Declaratory Judgments are organized under three headings roughly paralleling the divisions of the defendants' memorandum above noted. From a consideration of both sets of headings it appears that the whole argument falls naturally into three divisions as follows:

I. The effect of special procedure provided by the Railway Labor Act upon the court's jurisdiction to grant a Declaratory Judgment.

II. The right of the court to grant a Declaratory Judgment as a means of judicial review of administrative orders.

III. The effect of the granting of such judgment upon the rights of the parties.

We shall organize the ensuing discussion under the above heads:

REPLY ARGUMENT

I. The Effect of the Special Procedure Provided by the Railway Labor Act Upon the Court's Jurisdiction to Grant a Declaratory Judgment.

We pointed out in our original brief that the Railway Labor Act has established a procedure for the adjustment of disputes between carriers and employees growing out of the interpretation or application of col-

lective agreements between them. We showed that this procedure consisted of two steps: The first, before the National Railroad Adjustment Board, is an administrative step. The second, where a complaint is filed seeking to enforce the Board's order, is a judicial step. This second step is more than an enforcement procedure, but is one also for judicial review, for the court in such an action is specifically authorized to either enforce or set aside the order of the Board.

We further showed from the phraseology of the statute, and from the legislative and administrative history of its provisions, that the relation existing between the administrative and judicial steps provided is so close as to lead to the conclusion that the Congress intended the judicial step to form an essential feature of the whole comprehensive scheme. Otherwise stated, if the administrative process has been invoked and has been pursued to the extent of securing an administrative ruling, the only avenue of approach to the courts for a review of that ruling is through following the statutory procedure which is intended to be exclusive.

This argument has been completely misconstrued by plaintiff. While we have thus attributed an exclusive character to the *judicial* step of the statutory process, it insists we have attributed such character to the *administrative* step. Thus we are placed in the position of having said that Congress intended to oust the courts of jurisdiction to decide all controversies of the type to which the jurisdiction of the National Railroad Adjustment Board attaches. As to the question of whether this was or was not the legis-

lative intent, it is not now necessary to express an opinion. The question may well wait for a case in which it is directly presented.

The defendants are not contending that *any* provision of the Railway Labor Act has *"ousted"* the courts of jurisdiction. We do assert, however, that where the Adjustment Board has made a decision and where the statute has specifically provided the identity of the persons, the time, and the manner whereby the correctness of that decision may be submitted to the courts, that method must be pursued. We do not, therefore, contend that the jurisdiction of the courts has been ousted by the provisions of the Railway Labor Act, but merely that the means of invoking that jurisdiction have been defined.

It follows therefore that a considerable portion of the plaintiff's brief is taken up with a reply to an argument which has never been advanced. In this connection we will consider the various divisions of Section I of the plaintiff's brief in order.

Thus Section IA (pages 8 to 17) is devoted to the citation of cases, which are claimed to support the proposition that carriers or employees may resort to the courts for interpretation of their contract rights instead of resorting to the procedure set up by the Railway Labor Act. With the exception of two, the cases cited involved disputes which had never been submitted to the Adjustment Board at all. These two exceptions (*Nord vs. Griffin*, 86 Fed. (2) 481, and *Lane vs. Union Terminal Company*, 12 Fed. Supp. 204) were brought by *employees* who asserted that their rights had been prejudiced by rulings of the Adjustment

Board in proceedings to which they claimed *they were not parties and of which they had no notice.* The plaintiffs in these actions were neither petitioners before the Adjustment Board, parties for whose benefit the awards of the Board were made, nor carriers. Hence they could neither sue nor be sued pursuant to the provisions of the Railway Labor Act (See Railway Labor Act, Section 3(p) quoted in the appendix to our principal brief, pages 78 to 79), and it was accordingly held that they might invoke the general equity jurisdiction of the courts regardless of the statutory procedure. These cases obviously do not support the proposition that one who is amenable to the statutory procedure may similarly institute an action for review in complete disregard of the provisions of the statute.

Perhaps some or all of the other cases cited by the plaintiff in this section might be relevant in a situation where an award had been neither sought nor issued by the Adjustment Board, and where it was contended that the mere existence of a statutory *administrative* procedure precluded resort to the courts in any case. The cases in question are not relevant to the issue of whether *after an award has been made,* the parties, or either of them, may secure a judicial review of the controversy through means other than those prescribed by statute.

Section IB of plaintiff's memorandum (pages 17 to 20) is based on the same fundamental misconception of the issues. In this section plaintiff states as a premise the conclusion drawn from the preceding section, *i. e.,* that it is not the intent of the Railway Labor Act to oust the courts of general jurisdiction over con-

troversies regarding the interpretation of agreements between carriers and employees. Arguing from this premise it concludes that it is not the intent of the statute to oust the courts of the special jurisdiction conferred by the Declaratory Judgments Act. Even if we concede the correctness of this conclusion it can be applicable no further than is the premise upon which it is based. Hence the plaintiff's argument, if correct, merely concludes that the *administrative* procedure set up by the Railway Labor Act does not prevent a resort to the courts for the purpose of seeking a Declaratory Judgment, but does not establish that the judicial procedure there provided has the same effect. We have already pointed out in our principal brief that it is not the purpose of the Declaratory Judgments Act to provide a substitute for a special remedy made exclusive by statute. We are unable to see how the plaintiff's argument in this connection militates against this conclusion.

Section IC (pages 20 to 27) is devoted to a discussion of the rule that a Declaratory Judgment may not be issued as a substitute for a special statutory remedy and concludes that the rule is applicable only where the statutory proceeding is *exclusive*. This we freely concede. Plaintiff concludes this section of its brief, however, by stating "that the statutory remedy or procedure established by the Railway Labor Act is not of this character, has been made abundantly plain in the two preceding sections of this brief." This conclusion does not follow. What really is "abundantly plain" is the fact that having established to its satisfaction that the administrative remedy provided by

the Railway Labor Act is non-exclusive, the plaintiff is assuming without proof that the statutory procedure for the review of administrative decisions is also non-exclusive.

Section ID of the plaintiff's memorandum (pages 27 to 36) is devoted to a discussion of the policy of the Railway Labor Act and the functions of the Board. In this connection the plaintiff has represented the defendants as contending that it is the function of the National Railroad Adjustment Board in cases of this kind "to substitute new rights and obligations between the parties in place of those which have been created by their contract, and to that extent impose a new contract upon them." (Page 28.) Plaintiff concludes that, if this be true, and if the statutory procedure (by which note it again refers to the *administrative* procedure) is exclusive, then the obligation of the contract between carriers and employees would be destroyed.

This conclusion is based on nothing more substantial than the defendants' argument to the effect that the functions of the National Railroad Adjustment Board are administrative, because, for one thing, it was intended that the Board, when deciding a case involving the present rights of the parties, should give some consideration to the effect of its findings as a means of healing the breach between them. Thus in doubtful cases the Board might take into consideration the desirability of a uniformity of practice on the railroads in certain regards, and might interpret somewhat varying provisions in various agreements as having been intended to express the same thought. This is a consideration involving future relations of

the parties, yet it could not well be argued that, by taking such a factor into account, the Board has made a new agreement for the parties. No doubt similar considerations influence the Board's decisions in other types of situations and properly so. No one ever contended that the Adjustment Board should have the power to deliberately set aside an existing contract and substitute a new one. The defendants certainly have not contended, and do not contend, that the Board has any such authority.

It is true that plaintiff argues in this case that the Board's decision would in effect make a new contract for the parties. However, in every controversy concerning the interpretation of an agreement the losing party always contends that the deciding tribunal either read something into the contract which was not there, or read something out which was there. This, however, is but the stereotyped method of saying the tribunal erred in its decision.

If the National Railroad Adjustment Board erred substantially in this case, that error can have a detrimental effect upon the carrier only if and when proceedings are instituted to enforce the Board's award. In these proceedings, if prejudicial error is shown, the court would be justified in reversing the decision of the Board. The existence of such an error, however, or the existence in the Board of the potentiality of making such errors, does not authorize the court to utilize as a means of correction, a Declaratory Judgment in substitution for the exclusive method of review provided in the Railway Labor Act.

Section IE of the plaintiff's brief (pages 36 to

41) is devoted to a discussion of certain cases which have arisen under the Interstate Commerce Act. The provisions of this statute as to the enforcement and review of reparations orders are substantially the same as those of the Railway Labor Act providing for *enforcement and review* of decisions of the National Railroad Adjustment Board. The plaintiff argues that, inasmuch as it has been held that in some instances reparations claimants are not compelled to invoke the administrative process of the Interstate Commerce Commission, but may take their claims directly to the courts, the same conclusion follows here. This, of course, is another example of the plaintiff's attitude in confusing the administrative processes of these acts and the prescribed provisions for review, from the point of view of their exclusiveness. Without discussing the correctness of the conclusion which has been drawn from these cases, we direct the court's attention to the fact that the plaintiff has cited no case where an administrative decision had been rendered by the Interstate Commerce Commission, and where it was held that the carrier might ignore that decision as well as the statutory means provided for its review, and institute a new action in the courts for a redetermination of the same rights which had been decided by the Interstate Commerce Commission. If such a case existed it might be some authority for the plaintiff's position here. The absence of any such decision, however, affords proof of the exclusive nature of the review provisions contained in the Interstate Commerce Act, and, by analogy, of the similar provisions contained in the Railway Labor Act.

An examination of the entire first section of the plaintiff's memorandum reveals therefore that it has hopelessly confused the administrative machinery established in the Railway Labor Act with the judicial procedure provided for the review of the decisions of the administrative agency created thereby. The real question at issue here relates to the exclusiveness of the *latter*. This the defendants have established in their principal brief, while the plaintiff argues at length that the former is *non-exclusive*—a question which is in no way involved in this case.

II. The Right of the Court to Grant a Declaratory Judgment as a Means of Judicial Review of Administrative Orders.

In the first place in this connection the plaintiff argues that the present proceeding is not one for review of an award of the Adjustment Board. It is asserted that plaintiff's cause of action is founded upon the contract of the parties and that all references to the award of the Board contained in the complaint are really not essential to the cause of action but were inserted merely to make a complete disclosure to the court. In effect, therefore, the plaintiff says that because it asserts rights allegedly based on a contract, the procedure cannot be one for review. This is obviously fallacious. All judicial proceedings (except those involving procedural issues) are based fundamentally on assertions of rights and in every case involving a contract, upon assertions of contract rights. This is true whether the proceeding is one *de novo* or for review. *The nature of the rights asserted* affords

no criterion for determining the *nature of the proceedings*. The true test of whether a proceeding is for review is to be found in the effect which a judgment will have upon the decision of some other tribunal. That the present action is one designed to affect the award and order of the Adjustment Board is shown both by the language of the complaint and by the logic of the situation. The plaintiff on pages 12 and 13 of its complaint prays the court for a judgment "declaring that said Award No. 3115, Docket No. 5059 and Order of the National Railroad Adjustment Board, First Division, entered therein, *did not lawfully confer any right* upon the defendants to perform the work of making such movements, and that said award and order insofar as they purport to confer any such right are *invalid and of no legal force and effect.*" (Emphasis supplied.)

This language is consistent only with proceedings designed to secure a judicial review of the legality and sufficiency of the Board's award and order.

It is apparent that if this action is designed to have any result at all, that result *must* be effective upon the award of the Board. As we have seen such award has certain definite effects upon the procedural rights of the plaintiff as to costs, attorneys fees, statute of limitations and burden of proof, if it is used as the basis of a court procedure for enforcement. If this action is to have no effect upon the Board's award, then regardless of the action of this court, the award can be used as a basis for suit by the employees in the future with all of the advantages to the plaintiff attendant upon such a suit. As we understand it, how-

ever, the specific purpose of this action is to litigate here all issues which might be raised in an action for the enforcement of the award. If the plaintiff were to obtain a favorable judgment from this court on these issues, the only way in which the fruits of its victory might be guaranteed it, would be for this court to *void the award of the Adjustment Board as the basis for any future enforcement action.* Thus it necessarily follows that this proceeding, if it seeks any tangible result at all, seeks a review of the award of the Board.

The plaintiff contends further, however, that even if this action is one seeking a judicial review, it still is entitled to relief by declaratory judgment. It does not in its memorandum controvert the proposition that, in general, a review may not be obtained through resort to the Declaratory Judgments Act, but asserts that this doctrine should be limited to attempted reviews of judicial orders and apparently to certain types of administrative orders possessing a high degree of finality. It is argued, therefore, that awards of the National Railroad Adjustment Board do not come within the general rule of law due to several reasons, *viz.*: (1) The nature of the Board itself, *i.e.*, the fact that it is a tribunal whose members are appointed by private agencies; (2) The nature of the Board's awards, *i.e.*, the lack of the power of enforcement reposing in the Board; (3) The fact that the Board attempted to re make the agreement of the parties (which, as we have seen above, is equivalent of saying the Board committed an error of law in its decision); (4) The fact that the Board in reaching its award followed an allegedly unlawful method of procedure.

Before considering these arguments specifically a brief general discussion is required. The statutory requirement for the bringing of a suit for declaratory judgment is the existence of an "actual controversy" as to rights. Otherwise stated, there must be an uncertainty in the mind of one of the parties as to his legal status plus the possibility of damage to him if he acts on his own interpretation of it. A decision of the controversy by any tribunal changes the entire situation. An uncertainty may still exist in the mind of the losing party as to the correctness of the decision, but as pointed out in our original brief, this is not such an uncertainty as to confer jurisdiction under the Declaratory Judgments Act, as that statute was not designed as a means of testing the correctness of the decisions of another tribunal.

With this fundamental principle in mind, let us examine the plaintiff's four arguments above noted:

(1) The nature of National Railroad Adjustment Board—The plaintiff points out on pages 52 to 54 of its brief that the members of this Board are selected and paid by private interests, instead of being appointed by the government, and it concludes that this fact is of such significance as to "operate to render unconstitutional any attempt by Congress to vest the determinations of the National Railroad Adjustment Board with the degree of conclusiveness against attack in the courts which is enjoyed by determinations of such bodies as the Interstate Commerce Commission."

We submit that this argument completely misses the point. No contention has been made by the defendants that orders of the National Railroad Adjust-

ment Board are endowed with any "conclusiveness against attack" in proper proceedings for review. All administrative orders which are not purely ministerial in nature are subject to judicial review. The question involved in this case is not the *effect* to be attached to the orders of this Board in review proceedings, but rather the propriety of the *method* of review attempted.

If, as we have shown, the function of a declaratory judgment is not to pass upon the correctness of a decision of another tribunal, the nature of the tribunal making the decision is immaterial.

(2) The nature of the awards and orders of the National Railroad Adjustment Board—The Railway Labor Act provides that an award of the Board shall be "final and binding upon both parties to the dispute," *i.e.*, the employees and the carrier. We have pointed out already that this language of the statute is qualified in effect by the fact that the Board itself has no power of enforcement. This factor has been seized upon by the plaintiff as the basis of an argument to the effect that procedure looking toward a declaratory judgment is available as a means of review of such awards. By implication the plaintiff appears to concede that an administrative order, which is enforceable by the tribunal issuing it, cannot be thus reviewed. As we have seen, the basis for an action for Declaratory Judgment is found in a controversy giving rise to uncertainty as to the status of legal rights. When an administrative decision has been issued passing upon those rights, what difference is made because of its *administrative* enforceability or non-enforce-

ability? In either case an actual decision has been made. In either case the person against whom it was rendered has the option of compliance or non-compliance. In either case by non-compliance he subjects himself to an enforcement procedure, which, in the first case, takes the form of administrative coercion, and in the second takes the form of a suit seeking judicial coercion. In both situations any uncertainty as to *rights* is terminated through the administrative decision and compliance therewith ends the controversy. In both situations a measure of uncertainty may be perpetuated by refusal to comply with the decision, but that uncertainty results not from any doubt as to the rights themselves which might arise from the lack of an applicable decision (which lack may form a proper basis for an action for Declaratory Judgment), but from a doubt as to the correctness of the decision (which is not a proper basis for such an action).

Thus the distinction which the plaintiff seeks to draw between administrative decisions which are, and those which are not, enforceable by administrative orders, is a mere distinction without a difference, for in neither case do we find any basis for the prosecution of an action for Declaratory Judgment.

The third and fourth arguments of the plaintiff in this connection may be considered together. Both point out what are alleged to be errors of law committed by the Board in this case. It is asserted first that the decision was erroneous in that it sought to incorporate terms in the contract between the parties which are not contained therein (which, as we have seen, is merely the classical and stereotyped way of

saying the contract was misinterpreted), and, second, that the Board's procedure was erroneous. These claims, if correct, might well justify a court in setting aside an order of the Board which was properly before it on review, but are utterly irrelevant to the issue of the correctness of the procedure by which that review is sought.

We have no quarrel with the cases cited by the plaintiff in this section of its brief (pages 46 to 51) to the effect that a judicial review should be available to parties aggrieved by administrative order; or that where no method for such review is provided by statute, the general equitable jurisdiction of the courts may be invoked for that purpose. We repudiate, however, the statement attributed to us on page 51 of the brief to the effect that "defendants correctly assert that the statutory suit which employees are authorized to bring under Section 3(p) of the Railway Labor Act is not a review proceeding." We are at a loss to explain how the plaintiff could have so thoroughly misconceived our argument on this point inasmuch as the defendants have throughout contended exactly to the contrary.

It is apparent that the cases which the plaintiff cites have no bearing upon a situation where a specific method of review is provided in the statute which has established the administrative board in question.

Further, while it must be conceded that if no statutory method of review were provided, the courts might in an appropriate case exercise general jurisdiction to provide such a review, it by no means fol-

lows that they may do so through the medium of a Declaratory Judgment, which in no event can be considered as a procedure appropriate for the purposes of review.

Hence the conclusion reached in our principal brief in this regard is unshaken. The Declaratory Judgments Act was passed in order to provide a means for the determination of undecided issues—not as a means for determining the correctness of prior decisions of those issues; or, in other words, a judicial review may not be obtained through the medium of a Declaratory Judgment.

III. The Effect of the Granting of Such Judgment Upon the Rights of the Parties.

In this connection the defendants have already pointed out that the granting of the relief asked in this case will effectively deprive them of certain rights guaranteed by the Railway Labor Act as to the bringing and prosecution of a proceeding for enforcement or review of orders of the Board, *viz.*: (1) The right of selection of a forum; (2) The right to the benefit of the statutory period of limitations of two years; (3) The right of exemption from certain liability for costs; (4) The right to recover attorney fees, and (5) The right of having *prima facie* effect accorded the findings of fact made by the Board.

As to the first two of these rights the plaintiff asserts they are merely the rights ordinarily held by potential plaintiffs, and are always and necessarily

taken away by the invocation of Declaratory Judgment procedure. This is not correct for, as we have already shown, these rights are not identical to the somewhat similar rights enjoyed under ordinary rules of law, but are especially accorded to the employees by the Railway Labor Act in order to accomplish special purposes. (See defendants' principal brief, page 39 to 40).

As to the third and fourth of these arguments, the plaintiff admits that the granting of a Declaratory Judgment will deprive the employees of the rights in question, but says in effect that such a result may be justified by the employees' failure to bring suit, and thus secure the enjoyment of these rights. By this argument the plaintiff is clearly seeking to have this court amend the Railway Labor Act. This statute sets up the rights in question and provides that they may be exercised within two years of the effective date of an order of the Board. The court is being asked to decree that these rights are available only during the indefinite period of time between the granting of such an order and the date when the carrier elects to bring suit for a Declaratory Judgment. If this had been the purpose of Congress in enacting the Railway Labor Act why, may we ask, did it not so state?

In addition to causing a practical nullification of certain provisions of the Railway Labor Act, this doctrine, if adopted, will inevitably result in a race between carriers and employees to see which can get into court first if an order is issued—the prize being the various advantages which the employees will or will not receive depending upon the identity of the

plaintiff. Due to this necessity for haste in invoking the jurisdiction of the courts, if statutory rights are to be protected or defeated, many cases which could be amicably compromised will reach the courts for judicial determination, a result which is foreign to the essential purposes of the Railway Labor Act.

The fifth right of the employees above mentioned is not considered by the plaintiff in this section of its brief, but is obviously subject to the same considerations as above outlined.

As to the alleged rights of and possible damages to the plaintiff, little need be added to our original discussion. Plaintiff complains of certain injustices and asserts these injustices as the basis for seeking a Declaratory Judgment. When analyzed, the injustices in question are revealed as being neither more nor less than the unequal consequences intentionally attached to the orders of the Adjustment Board by the statute. If there is any real injustice here (which we do not admit) the plaintiff's remedy is legislative—not through an action designed to procure from the courts a judicial amendment of the statute.

SUMMARY

We are fully aware that technically the burden of the issue in this proceeding is upon the defendants. It must be borne in mind, however, that the plaintiff is asking of this court a form of relief which is unusual, and which, if granted, may have far-reaching consequences. Thus the nature of its plea places upon

the plaintiff the duty of affirmatively maintaining, by reason and authority, the propriety of the relief prayed for in regard to the situation in which it is sought. The plaintiff's memorandum, however, is singularly deficient in any such positive justification of its position both in what it has said and in what it has left unsaid. In closing this reply we wish to touch on a few of these deficiencies.

(1) *The lack of cited authority for plaitniff's position.* It is apparent from plaintiff's memorandum that it is seeking to extend the scope of the relatively new type of legal relief provided by the Declaratory Judgments Act into an untried field. Although the diligence of the plaintiff's counsel has produced a large number of decided cases for the consideration of the court, not one case is cited which specifically supports the proposition that the courts may by Declaratory Judgment provide a judicial review of administrative decisions. This dearth of authority in and of itself is indicative of the fact that the plaintiff is seeking to apply the Declaratory Judgments Act to a sort of situation to which it has never been applied and was never intended to be applied.

(2) *Lack of complete statement of position regarding awards of Adjustment Board.* Just what legal effect does the plaintiff attach to the awards of the Adjustment Board? It is clear that it considers itself privileged to ignore the award issued in this case and to sue on the contract without reference to the award. If the plaintiff may do this, any carrier similarly situated may do the same. It is obvious that the carrier

may only ignore the award if the award itself has no legal significance, *i. e.*, if it is a nullity. Why is this award a nullity? Has it always been such, or did it become so only on the filing of this suit for Declaratory Judgment? Can a private party nullify an administrative order merely by bringing a Declaratory Judgment action? If such awards are nullities as to the carriers, are they nevertheless to be considered as binding upon the employees, or are they nullities as to the employees also? All of these questions are inherent in the position which the plaintiff has taken, yet plaintiff has made no attempt to answer them. It has contented itself with asserting an individual right to a Declaratory Judgment—let the chips fall where they may. The above are some of the legal chips which will necessarily fly from a judgment for plaintiff in this action, and we believe that the court is entitled to know where they will fall and upon whom, before it renders a decision.

(3) *Lack of clear statement as to the effect of a Declaratory Judgment upon subsequent proceedings.* If the court grants a Declaratory Judgment in this case, what effect will it have upon an action which might be subsequently brought to enforce the award of the Board? It is provided in the Railway Labor Act that the petitioner before the Board "or any person for whose benefit" its order was made, has the right to file an enforcement proceeding. Is that right to be considered as taken away by the granting of a Declaratory Judgment? We presume from the tenor of its argument that the plaintiff would answer this question in the affirmative and would contend that a

Declaratory Judgment might be made the basis of a plea of *res adjudicata* in an enforcement action. It could have such an effect, however, only as to the parties and issues before the court in the Declaratory Judgment action. As to parties, the petitioner before the Board, *i. e.*, the labor organization which represents these employees, has a right to bring an enforcement action but is not named as a party to this suit. In view of plaintiff's insistence that the present suit is not one to review the order of the Board, we may well ask whether the question of the validity of the award is before this court at all. If not, then the Declaratory Judgment of this court will not decide the question of the award's validity in such manner as to be binding in an enforcement proceeding. Furthermore, it is to be remembered that a different rule is to prevail in an enforcement action regarding the burden of proof and the value of certain evidence inasmuch as the findings of fact of the Adjustment Board are to be held *prima facie* correct in such a proceeding.

If the Declaratory Judgment prayed for here would not be *res adjudicata* as to all of the persons or of all of the issues involved in an action to enforce the award, we have the possibility of there coming into existence two judgments—one the Declaratory Judgment of this court, and the other a judgment of enforcement of another federal court, the one holding that the plaintiff's contract with its employees has a certain meaning, the other enforcing an award of the Board which attaches to the same contract a different meaning. Under such circumstances, which judgment is to prevail?

It follows from all of the foregoing that the plaintiff is seeking to have this court apply the Declaratory Judgments Act in a field where its application is unprecedented. It is of vital importance to the court, as well as to the parties, to have some idea concerning the probable legal effects of such an application. This is particularly true here, where another statute is involved which has created a carefully planned procedure of administrative action and of judicial review. The plaintiff's memorandum sheds little light on the question of the reaction which a Declaratory Judgment might be expected to have upon the Railway Labor Act, the National Railroad Adjustment Board, the decisions of that Board, and the enforcement and review proceedings provided by the Act.

The defendants on the other hand have shown that the necessary effect of the issuance of such a judgment will be to provide an extra-statutory method of review for the Board's decision when the statute contemplates an entirely different method as the exclusive means of accomplishing such a result. Any judicial review, and in particular a review sought under such circumstances, is not contemplated by the Declaratory Judgments Act as a proper exercise of this new and extraordinary jurisdiction which has been conferred by it upon the courts.

Further, the defendants have shown that the necessary effect of granting the relief asked will be to shear the defendants and other employees of the nation's carriers of rights granted them by statute, to reduce the awards of the National Railroad Adjustment Board to the status of legal nonentities and to

nullify Section 3 of the Railway Labor Act and the wholesome congressional intent underlying that section. It follows that this court in the exercise of its sound discretion should hold that the complaint fails to state a cause of action for Declaratory Judgment.

Respectfully submitted,

FRANK L. MULHOLLAND,
CLARENCE M. MULHOLLAND,
WILLARD H. MCEWEN,
HAROLD C. HEISS,
RUSSELL B. DAY,
WILLIAM E. WILLIS,
Attorneys for Defendants.

261 Transcript of Argument

Filed June 10, 1939

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INDEX

	Original	Print
Preliminary Argument on Legal Issues Raised by Answer	2	262
Argument of Mr. Willard H. McEwen on Behalf of Defendant	6	264
Argument of Mr. John Dickinson on Behalf of Plaintiff	30-52	278
Reply Argument of Mr. Willard H. McEwen on Behalf of Defendant	92	313

262 Court House Building,
Washington, D. C.,
Monday, May 15, 1939.

The above-entitled matter came on for oral argument, pursuant to notice, at 1:30 o'clock p. m.

Before O'Donoghue, J.

Appearances:

John Dickinson, Esq., 1740 Broad St. Station Building, Philadelphia, Pennsylvania.

Sidney R. Prince, Jr., Esq., Southern Ry. Building, Washington, D. C., and

Guy W. Knight, 1740 Broad St. Station Building, Philadelphia, Pennsylvania appearing for Plaintiff.

Willard H. McEwen, Esq., 1041 Nicholas Building, Toledo, Ohio.

Frank L. Mulholland, Esq., 1041 Nicholas Building, Toledo, Ohio, and

William E. Willis, Kellogg Building, Washington, D. C., Attorneys for Defendants.

263 *Preliminary Argument of Legal Issues Raised By the Answer*

Mr. Prince: If Your Honor please, I would like to introduce Mr. John Dickinson, appearing for the plaintiff; he is a member of the Pennsylvania bar and a member of the bar of the Supreme Court of the United States.

Mr. Willis: I desire to introduce Mr. Frank L. Mulholland and Mr. Willard H. McEwen of the Toledo bar; they are also members of the bar of the Supreme Court of the State of Ohio. They, with myself, represent the defendants.

Mr. Dickinson: If the Court please, we are here on what really amounts to a motion to dismiss made by the defendants. We represent the plaintiffs; we filed our complaint, and thereupon they filed an answer which included certain legal defenses going to the whole cause of action, and we have moved that those legal defenses, as we are entitled to do under the new rules—as I understand them—they should be urged separately in order to avoid necessity of having to prepare for a long trial, if there is no cause of action and, consequently, since the defendants are really in the nature of the moving parties here today, we have talked the matter over and reached a conclusion that it is for them to open and close.

264 The Court if this motion to dismiss should be overruled, will this case have to be heard on the merits, or are the facts in dispute?

Mr. Dickinson: Yes, if the motion to dismiss is overruled, then the case will have to be tried on its merits; if, on the other hand, the motion to dismiss is sustained we feel there should be no necessity for putting both parties to the trouble of preparing for what will be a rather long and intricate trial.

The Court: Is there so much dispute about the facts?

Mr. Dickinson: There is a great deal of dispute about the facts; the fundamental cause of action is as to the interpretation of a contract but, in order to interpret that contract, the situation at the time the contract was entered into, and the practical application of the contract over a period of almost thirty years, is involved, and we feel that in order to support a proper interpretation of the contract those facts will have to be gone into.

The Court: The only question in my mind was whether or not it would be possible to dispose of this case at the final hearing and not take too much time on it now.

Mr. Dickinson: Of course, the point there is whether or not it would be fair to the parties to require us to
265 prepare for trial in the event that at the time of the trial it should turn out that there was no cause of action.

The Court: Both sides consider that it would be impractical to try it on the merits now?

Mr. Dickinson: It certainly could not be tried on its merits now or next week; we would have to start the preparation for the trial; some of the witnesses are people whose recollection goes back twenty or thirty years and are no longer around Washington.

The Court: Very well; if counsel feel that it is not practicable for those things to be heard on the merits and disposed of once and for all, considering the time of the parties and the Court—you do not think so, do you?

Mr. Dickinson: We think very definitely that it could not be brought on for trial at the present time.

Mr. McEwen: We agree to that, Your Honor.

The Court: All right, it will come on for hearing on motion to dismiss the bill on account of the legal defenses raised in the answer.

Mr. McEwen: That is the situation. Before proceeding with the argument, in the first place, the argument will involve some points on the construction of the Railway Labor Act, and maybe some other Federal Statute.

For the Court's convenience, I have here a pamph-
266 let copy of that statute—the Railway Labor Act—if you care to consider it in the course of the hearing.

Furthermore, in order to save possible repetition—I am aware that Your Honor's time is taken up pretty much today, and I was wondering whether or not Your Honor would have an opportunity to give consideration to the pleadings at all.

The Court: I have not given them any consideration; I don't know a thing about them except from just glancing over a long bill, and I see where the defenses are set forth, and the different parts of the defense—you attack all of the paragraphs of the bill on the merits?

Mr. McEwen: Yes, sir.

The Court: You have a motion to dismiss the bill because there is no cause of action?

Mr. McEwen: That is approximately correct; yes, sir. We have stated our different defenses. You see, this is an action brought by the Washington Terminal Company against a group of its employees; the prayer of the case is for a declaratory judgment. Our first defense is that the allegations of the complaint are not sufficient to state a cause of action and, on that point, we ask that the complaint be dismissed.

The Court: Very well.

267 *Argument of Mr. Willard H. McEwen on Behalf of Defendants*

Mr. McEwen: If your Honor please, the only issue that is involved in this proceeding is the appropriateness of the remedy sought by the plaintiff; in view of the facts of this case, that is the only issue that is before the court.

Accordingly, it will not be necessary to go to any great extent into the facts except merely to show your Honor the stage setting in which the case operates.

The action, as I have said, is between the Washington Terminal Company and a group of its employees who work, have worked and are now working in its service as locomotive firemen and engineers.

The Washington Terminal Company is the owner and operator of the Washington Union Passenger Station; it owns no main line track, although it is a common carrier by railroad. It operates no trains, but it does own yard trackage and it does own and operate locomotives, which are used purely for switching over that yard trackage.

It has been the practice of this carrier for some time to use leased facilities—facilities are leased to the main line roads, which are spoken of in the complaint as the
268 "tenant lines," and its operations are conducted somewhat in this manner:

The main line trains come into the station with road engines and crews supplied by the railroads on which those trains originate; that is purely line of road movement.

On bringing those trains to a halt, however, it has always been the custom of this carrier to require, by agreement

with the tenant lines—to require those road engines and crews to do a certain amount of movement of cars in and about the yard.

Now, there is an agreement—a collective agreement—a union contract between the Washington Terminal Company and those employees, negotiated for the employees by the Brotherhood of Locomotive Firemen and Enginemen; they are represented by the three unions.

This agreement provides, in brief, that the employees shall be granted seniority rights in the work performed by the Washington Terminal Company; that provision and this custom of the Company to use a road engine and crews in the moving of certain cars has given rise to controversies of long standing.

It is the contention of the employees that the provision of the contract governing seniority rights cover a certain amount of work performed by the Washington
269 Terminal Company.

Mr. Dickinson: May I interrupt for just a moment? There is nothing in the contract about seniority rights with respect to certain work; it just says "seniority rights."

Mr. McEwen: I am now merely stating the contentions of the employees. The merits of that contention, Your Honor, are not before the Court and are not presented to the Court in this proceeding—just so that Your Honor may appreciate the controversy that is going on, and the solution of that controversy, which solution is now before the Court.

The carrier, of course, has contended that it is entirely within its rights under the contract to cause those movements to be made by the tenant road engines and the crews.

This controversy, as I say, has been a matter of long standing; efforts have been made to adjust it between the parties directly, without any success and, finally, it was submitted to the Railroad Adjustment Board, a Bureau organized pursuant to the Railway Labor Act, holding its sessions in Chicago; this Board holding a hearing, and the parties appeared before it, and the Board took the case under advisement and the Board decided the controversy in favor of the contention of the employees. It issued its award embodying that decision, a copy of the award

270 being attached to the complaint, and an order to the carrier directed it to comply with the award.

The carrier did not comply with the award, however, with the result that various individual employees who had seen various services performed by the road crews, which service they considered they were entitled to perform, have from time to time presented to the carrier claims for compensation for this work which they allege they should have been allowed to perform.

The carrier now brings this action in this Court for a declaratory judgment, and I might say to Your Honor, to start with, in the discussion, I believe this to be an entirely new and novel sort of relief to be asking for under the Declaratory Judgments Act.

There is no precedent for the use of the Act as a review procedure, and there is certainly no precedent as to the use of the Act in testing the sufficiency of the award of the National Railroad Adjustment Board.

I want to discuss this part of the Act a little more at length at a further stage in the discussion.

The Railway Labor Act is a statute designed to permit collective bargaining, and it is the contention of the defendants in this case that the relief which the plaintiff is seeking is inappropriate, in the first place, because there
271 is a specific remedy provided by the Railway Labor Act whereby the awards of the Adjustment Board may be brought before the Courts—a remedy which is especially adapted for that purpose.

Mr. Dickinson: But available only to the employees.

Mr. McEwen: Available only to the employees; that is to say, the employees may bring the action, and the carrier may defend it.

It is our contention that that remedy is designed by the Act to be an exclusive remedy and therefore, under the Declaratory Judgments Act and well recognized principles of law, that remedy cannot be set aside; the remedy by Declaratory judgment may not be substituted for it and that therefore the proceeding under the Declaratory Judgments Act is appropriate.

In the second place, it is our contention that the Declaratory Judgments Act in no event, regardless of the provisions of the Railway Labor Act—that in no event does it

provide or intend to provide a proceeding for the review of the decisions of other tribunals, whatever may be their nature.

Now, we will consider first these two contentions: that there is a special procedure—an exclusive procedure—provided by the Railway Labor Act whereby those mat-
272 ters may be brought to the Court.

In order to show the exclusive nature of that procedure, it will be necessary, I think, to discuss to the Court, to some extent, at least, the purposes of the Railway Labor Act. The machinery which is set up in the Act and, specifically, directing the Court's attention to the language of the statute which we believe, taken in conjunction with its general purposes, provides an exclusive avenue of approach to the Courts.

Mr. Dickinson: Mr. McEwen, if I may interrupt for a moment.

Mr. McEwen: Yes.

Mr. Dickinson: Are you taking the position that since enactment of the Railway Labor Act, controversies as to these contracts must be taken to the Railway Adjustment Board?

Mr. McEwen: That is right.

Mr. Dickinson: And go up through the Adjustment Board, and the jurisdiction of the Courts is ousted?

Mr. McEwen: Now, Mr. Dickinson, may I suggest that my time for argument to the Court is a little limited.

Mr. Dickinson: I am just asking you that.

Mr. McEwen: I think that might be brought out later in the argument.

Mr. Dickinson: You don't care to commit yourself?

273 Mr. McEwen: Not at the present moment; I will commit myself, sufficiently, I believe, before I get through.

Now, if the Court pleases, the purposes of the Railway Labor Act are to promote and to foster collective bargaining between employers and employees, and to provide administrative machinery whereby that collective bargaining may be made effective.

I suppose that all of us have had the term "collective bargaining" on our tongues considerably for the past few

years, but I doubt if most of the people who have used the phrase appreciate fully its entire significance. We naturally visualize a group of employees' representatives meeting with the representatives of the employer for the purpose of negotiating a collective agreement or union contract. That process of negotiation of agreements is, of course, an important element in collective bargaining, but it is only the beginning of the process and not the end of it because once an agreement has been made, I think Your Honor's own experience on the bench and professional experience, and certainly the professional experience of all of us causes us to realize that any contract made between any private parties, unless it be very simple, is likely to give rise to questions of its interpretation and application. This is particularly true of collective agreements designed to be enforced for many years; designed to cover
274 many situations and to provide for the situations of many different people.

If the interpretation and application of the agreement are matters to be left entirely within the jurisdiction of either employer or employee, it is obvious that collective bargaining is a farce because either side can easily interpret and apply the agreement which has been negotiated—can easily interpret and apply the agreement out of existence.

So that, as an essential feature of the collective bargaining process, it is necessary that means be provided whereby that process can be extended to the interpretation and the application of those agreements once they have been made.

The Railway Labor Act directs itself to both of those problems. Certain of its provisions are directed to the question of collective bargaining as a means of the execution of the contract; those are not for the Court to decide; certain others are directed to the means devised by Congress to protect collective bargaining; as to the interpretation and application of those agreements and those provisions, they are before the Court.

It is provided, in the first place, that the parties shall, if possible, hold conferences and adjust their grievances or their difficulties in those conferences. If they can-
275 not so adjust them, what then? Provision is then made in the Act for the creation of this Board—the

National Railroad Adjustment Board; it is a bi-partisan Board; half of its members are selected by the carriers and half by the carriers generally over the nation, and a selection in which the Washington Terminal Company participated when this Board was formed, and half by the National Labor Organizations of the employees.

It is divided into four divisions, each one having jurisdiction, however, only over disputes involving certain types of employment.

We are concerned here only with the first division which has jurisdiction over this type of case.

In the course of our brief, we have devoted several pages to the history of the development of Adjustment Boards—a history which is too long to repeat here and which is before Your Honor in printed form.

The Adjustment Board may be said to be—just to summarize—a Board hallowed by experience in a sense; it is a device which has been used nationally for over twenty years in the adjustment of this type of dispute and is a device which has been used on individual systems for longer than that.

It is a device which has been used very successfully because it has settled many thousands of disputes in various forms between employers and employees on railroads so, when the Railway Labor Act was amended on June 21, 1934, the framers of that Act adopted the adjustment Board device that made it a national institution, with jurisdiction nationally over all carriers and all employers to decide such cases as were submitted to it.

276

Just by way of completing the picture, it is provided that if this bi-partisan Board cannot agree in a given case, it may call in a neutral referee which sits with the Board and break the deadlock and render a decision.

Then, suppose the Adjustment Board has made its award; suppose it has decided that the employees are correct in their contention, then it makes an order directed to the carrier, ordering it to comply with the award under the provisions of the Act.

Now, I think we may say that we are getting really to the crux of the situation that is before the Court. Here your Honor will find a pamphlet which was passed up to you on page 8, section 3 (m) of the Railway Labor Act, at

the top of that page—the paragraph I marked in pen and ink, reading as follows:

"The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the
277 awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

What does this mean? It is rather apparent by examination of section 3 (p), which is the other section which has been marked on that same page, that it was not the intention of the framers of the Act to give an absolute finality to the decisions and awards and judgments of the Board; it was their intention to give what we have termed in our brief, the administrative finality, which is not a particularly clear expression perhaps, but I think we can clarify it by examining section 3 (p), which reads a follows:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition set-
278 ting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered,

under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Now, it is apparent, as Mr. Dickinson has already called to Your Honor's attention—it is apparent that the right of action that is granted under section 3 (p) is limited to employees who have prevailed in their cases before the Adjustment Board.

It is apparent, we readily concede, that the right
279 of action granted is in a sense one-sided; that only one party may appear in Court as plaintiff; that if a carrier is to appear in Court it must do so as defendant in such suit.

Now, why such provision for review? Because as your Honor knows, the Court is empowered not only to enforce the order but to set the award aside if it finds it legally insufficient.

Why those provisions? I think the answer is clear if we examine into the general basis of the Railway Labor Act. If the employees lose before the Court, their case is finally determined; they have no right to appeal if they lose; they have no right to review granted them by the statute, nor can they attack the statute as giving them inadequate procedure because I presume I am safe in saying that 99.9 per cent of those cases are presented by the employees and, having adopted the statutory procedure; having taken advantage of the statute, they are bound by its terms.

I might say in passing that those provisions of the Railway Labor Act are adopted almost verbatim from the provisions of the Interstate Commerce Act and the Packers and Stockyards Act providing for the review of reparations order of the Interstate Commerce Commission and of the Secretary of Agriculture; and, presumably, are designed to have the same legal effects, and under the Interstate Commerce Act it has been held that if a shipper proceeds before the Commission and loses, he has no right of
280 appeal.

Accordingly, I assume that if an employee proceeds before the Adjustment Board and loses, he simply has no right to carry his case into Court; his "day in court"

is ended. Now, the employee, therefore, goes before the Court at a certain disadvantage; if he loses the decree against him is final. If he wins, however, it is purely an interlocutory decree—an interlocutory decision, to gain the benefits of which he must file a suit in a Federal Court seeking enforcement of the Board's award.

In this suit he is given certain advantages; there is no question about that; he is given two years in which to file the suit; he is given the choice of courts in which to file it; he is given opportunity to recover his attorney's fees; he is given an opportunity to go in without liability for costs—all provisions designed to equalize the geographical and economic inequalities which normally exist between the carrier, with its wide spread lines and its large resources, and the individual employee or groups of employees which may be seeking to enforce an award of the Adjustment Board, and I think we can say, very frankly, that we believe those provisions were placed in the statute for just one purpose—they were placed there to make resort to the courts unproductive to the great carriers; they were placed there
281 to minimize the number of review proceedings which may be brought; they were placed there to give a certain sanction and compulsory force to the awards of the Adjustment Board; that is obviously the purpose and intent of this statute, when it comes to the Court and asks for a declaratory judgment, not by virtue of this statute, but by virtue of the Declaratory Judgments Act.

The plaintiff has set up a very appealing case in its complaint, but before considering that complaint in its detail it is desirable and necessary that the Court should realize the effect that the granting of a declaratory judgment will necessarily have upon the statutory procedure and upon the rights that are guaranteed to the employees by that statute, for if a carrier may come into Court for a declaratory judgment, the provisions of that statute, in section 3 (p) which I just read, are not applicable to the case, and the award of the Board and its findings of fact have no prima facie effect in this Court—

Mr. Dickinson: (Interposing) May I call your attention—

Mr. McEwen: Please refrain from interrupting, Mr. Dickinson; I will give you the same consideration when you are making your argument.

282 Mr. Dickinson: You will remember that?

Mr. McEwen: I will do that. Employees have no right in this Court to exemption of costs; they have no right to recover their attorney's fees, and the other rights guaranteed to them—all of those rights guaranteed to them by the statute for the specific and definite purpose of making the awards of this Board final; giving them as much administrative finality as it is possible for a statute to give, they will be completely eliminated in a declaratory judgment if it is issued in this action.

The plaintiff has taken a rather novel position. I think it will be apparent from our discussion that the Railway Labor Act provides a procedure with two steps: first, the administrative step before the Adjustment Board and, second, the judicial step whereby the awards of the Board can be brought into court.

It is the contention of the defendant that that judicial step—the second step—is an exclusive method of procedure.

Now, to proceed to answer Mr. Dickinson's original question as to the first step: it has been contended by the complainant in its brief that the first step is not exclusive;

283 in other words, that the party litigant before the controversy is in existence and before any action has been taken, that he has before him two roads which he may follow.

I am giving now, I believe, what is the plaintiff's contention: the first, the road—the road that we have discussed through the Adjustment Board, for the adjustment of the controversy regarding the interpretation of the contract; the second, the direct approach to the Courts seeking the judgment of the Courts interpreting that contract.

Now, the plaintiff has contended throughout that it is an option; that any party has an option as it comes to the forks in the road, to take either road.

That is not the position which we propose to argue in this case and it is not a position which we propose to deny; it is a position and a question which is not here involved. Our contention is that having taken the one road; having taken the administrative path, and having pursued it to the extent of getting an award of the Adjustment Board —a decision of the controversy—that whoever initiated the

proceeding, that has been the result, and that thereafte
neither party may ignore the whole administrative proc
dure—wipe it out; go back again to the fork in the road a
start all over again, and go down the other path.

That is our position—what might have been th
284 rights of this carrier had the award so issued, is n
a matter that is important in this case; that que
tion may well await the litigation that raises the issue.

The issue here is the avenue provided by the statute f
bringing these awards into Court. It is our contentio
that it is an exclusive right and that the Declaratory Jud
ments Act cannot be utilized as a substitute procedure.

Now, one further thought in that connection: what wi
be the effect of the granting of a declaratory judgment i
this case, on the procedure set up in the Railway Labo
Act?

The plaintiff contends that it has a right to a declar
tory judgment here because such claims are being file
against it by its employees and because it has doubts as
its legal rights; doubts as to the proper interpretation
the contracts and doubts which it wishes this Court to s
at rest.

I think it will be apparent that any carrier against who
an award of the Adjustment Board has been made is i
exactly the same position as the plaintiff; the facts upo
which the plaintiff depends for its cause of action are n
peculiar to its situation; they are the same facts—esse
tially the same facts—which are presented to every case
this type; in other words, if declaratory judgment
285 granted in this case there exists no valid reason wh
it should not be granted in every case where th
award of the Board goes against the carrier who is a part
to the proceedings.

Now, if that be the fact, the granting of a declarato
judgment and the sanctioning of that practice in cases
this kind can have but one effect; it wipes out entirely
of the rights that are guaranteed to the employees und
section 3 (p) of the Railway Labor Act; they are gone.

Mr. Dickinson: What rights are those?

Mr. McEwen: Those rights which I referred to a fe
moments ago—referred to the Court. The Act itself w

necessarily be crippled. The statutory procedure cannot help but be crippled.

As I called to Your Honor's attention, the employees now go into the Adjustment Board under certain disadvantages; if they lose the decision is final; if they win it is only interlocutory.

If the relief prayed for by the plaintiff is granted in this situation it will change that picture to the point where, if the employees lose it is final and if they win, the order of the Adjustment Board is worthless—is a nullity—and the carrier can easily at any time take the matter into
286 Court for a declaratory judgment and try the whole matter over again without reference to the award of the Board and without reference to statutory rights given to the employees after such an award has been issued, when it is brought into Court for review and enforcement.

Now, I feel that the declaratory judgment statute is new; of course, the procedure under it is novel; it is unusual in the Federal Courts; as a statute it is still young—only five years old—the courts are still working about in an effort to apply that statute in the sort of case it was intended to reach. There is no precedent for its use in a situation of this kind; there is no precedent for its use as a method of review of a decision of the Adjustment Board and, accordingly, I feel that the Court should be extremely cautious in this case and to be sure of the legal consequences of the decree which it is being asked to render.

Now, as I stated in the beginning of the argument, there is yet a second ground: we consider this action to be ill-brought; the Declaratory Judgment Act passed for the purpose of remedying a specific ill and a specific lack which existed in our judicial system. Where a man was engaged in business relations, contractural or otherwise of a legal nature, connected and associated, and was in doubt
287 as to his rights under that relationship, under our old procedure he had but one thing to do: he could act on his own interpretation of his rights at the risk of violating his prospective opponents' rights by bringing himself into Court; that was considered to be a wasteful process, so it was provided that where a party was in honest doubt as to the existence of rights, and where that honest doubt was such that he was liable for damage if he

acted upon his own interpretation or, rather, incurred this risk, he might first proceed in Court for a declaratory judgment.

As was stated by the Court of Appeals of the State of Kentucky in this connection in the case of Back's Guardian vs. Bardo, 234 Kentucky 211, cited at page 46 of our printed brief:

"The purpose of the Declaratory Judgments Act was to have a declaration of rights not heretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the Code requires to be taken in the same action, or for an appeal to this Court. In the circumstances, the Court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties."

In other words, what plaintiff is seeking to do in
288 this case is not to get a decision of an undecided controversy, but to seek the judgment of this Court as to whether or not a decision which has already been rendered—an administrative decision—has been proper.

The uncertainty as to the rights which is in the mind of the plaintiff, is not an uncertainty that grows out of a lack of decision, but unwillingness to accept the decision which has been made, which is, in itself, a perpetuation of the uncertainty. This uncertainty is self created and it grows, not out of a doubt as to its legal rights, but out of doubts as to the correctness of the decision of another tribunal, and that, if your Honor please, is not the purpose of the Declaratory Judgments Act; it is not an appeal statute; it is not a method for review; it is a method for deciding rights which have not theretofore been decided.

Now, in this same connection there is another matter: the order of the Board itself does not threaten the plaintiff with any damage. The order of the Board, as far as the Board is concerned, is an enforceable order; it is enforceable only by Court action and, certainly, before the plaintiff can show that it comes properly within the purview of the Declaratory Judgments Act, it must show two
289 things, as we have noticed: that it acts upon its own interpretation that damage will result.

Now, as far as the award of the Board is concerned, no

interpretation which the Court might place upon that order will affect the plaintiff's rights a particle; the plaintiff is subject to no damage from any enforcement of the award except in judicial proceedings which afford its "day in court", and where it may test out the correctness of the award itself.

Now, in closing this phase of the argument, I just want briefly to call to your Honor's attention the fact, as I have already said, that I feel your Honor is being asked to disrupt the administrative processes of the Railway Labor Act; is being asked to invalidate section 3 (p) and the other provisions of section 3.

The Court is being asked virtually, by statutory amendment, to take that portion out of the statute because the granting of a declaratory judgment would render all of section 3 in the Adjustment Board's procedure nonsense.

The Board itself would be reduced to the position of an academic debating society whose words had no significance whatever, and the Act itself reduced to the status of a mere exercise of Congressional interest.

290 The system which Your Honor is being asked to interfere with is a successful system.

I wish in closing to quote some statistics already in the briefs. This Board since its establishment, for the period ending June 30, 1938, which is the last period for which we have reliable statistics—the last report the Board made—docketed a total of 7,109 cases; 3,891 cases have been heard and 4,247 cases decided. Of this total the first division alone has docketed 6,080 cases, has heard 3,078 cases, and has decided 3,329.

If that is true, if this declaratory judgment should be granted in this action, and if this administrative machinery is to be thus wrecked, the purposes of the Railway Labor Act providing for the orderly settlement of disputes, will be nullified to the extent of those many thousands of cases; the fact remains that the provisions of the Act including those for review enforcement and review of the awards of the Board, however they might seem to the Court—just or unjust, to be fair or unfair, equal or unequal, they are the judgment of Congress, and that judgment has been substantiated by the fact that the Act is and has been a success.

291 ***Argument of Mr. John Dickinson***
on Behalf of Plaintiff

Mr. Dickinson: If the Court please, I foresee that my argument will probably take about an hour and a half—our full time, and I will either proceed at the present time for forty five minutes, and then, or whenever your Honor chooses to adjourn Court; or else, if your Honor desires, to adjourn Court at an earlier time, I will be very glad to postpone whatever argument I might have until tomorrow morning—what is your Honor's pleasure?

The Court: I don't mind sitting late; you can go ahead and maybe you will finish by the time I want to adjourn.

Mr. Dickinson: I am afraid I won't.

The Court: Go ahead anyway; there is plenty of time tomorrow.

Mr. Dickinson: Thank you. If the Court please, I would like to bring the discussion down to particulars: I think it was Mr. Justice McKenna who, in one of his opinions, said that alarms are not arguments, and we have no intention here of wrecking anything or of reducing anything to invalidity, as I think I shall show, but I will say before my argument has reached its conclusion, it might very well appear that the position which the defendants are taking in this case is a position which will reduce the con-

292 tracts that are arrived at by collective bargaining, to something that is, in no legal sense, contracts at all, and we feel that it is to their interest, as well as our interest, that any such results as that should not be reached, but that those contracts arrived at by collective bargaining should be given the same measure of legal protection—and that means the same measure of legal protection to both sides—as is given to other contracts in the law, or else collective bargaining is a delusion and a sham.

But, leaving those generalities for the latter part of the argument, and coming down to particulars, this case is a case involving the construction of a contract. In 1923 a contract was made by the Washington Terminal Company with the Labor Organizations which represented its yard engineers and firemen and which included among its provisions a term respecting "seniority"; that is substantially the same term that had been used previously in the employment contracts of the company dating back to 1910.

A dispute has arisen between the company and its employees respecting what that term "seniority" means, and the employees are threatening the company at the present time with demands for money payments based upon their interpretation of what the word "seniority" means.

293 So that unless there is some special obstacle here, the case seems to be a perfectly normal one for the application of the declaratory judgment procedure.

Mr. McEwen spoke of that procedure as limited to cases where people are in business together and fell out about the meaning of the contract which embodied their mutual arrangements.

Well, I take it he did not mean to limit the operation of the Act in partnership cases.

The Washington Terminal Company and its employees are in a sense in business together; that is, the successful conduct of their business depends upon their being able to reach an understanding with regard to their mutual relationships and they have reached an understanding resulting in these claims and demands which we now come into Court and ask to have the Court adjudicate in the same way as they would adjudicate the interpretation of any other contract.

So, I say the case seems to be clearly one for a declaratory judgment unless there is some special obstacle, and the obstacle which is suggested in the argument arises out of the Railway Labor Act of 1934.

As Mr. McEwen stated, the defendants are apparently unwilling to take a specific position as to the nature of the obstacle, as to whether the mere existence of the

294 Railway Labor Act and the Adjustment Board bars access to the Courts so that all controversies respecting these employment contracts must go via the Adjustment Board's procedure, or whether the obstacle consists of the fact that in this case there have been proceedings before the Adjustment Board. I understood him to say that he does not take the position as between those two obstacles.

Now, as to the first point, namely, that the mere existence of the Railway Labor Act and the existence of the Adjustment Board thereunder establishes an exclusive procedure for the interpretation and construction of labor contracts,

that seems to be conclusively answered by a whole line of cases cited at pages 8 and 9 of our brief, where the construction of labor contracts between a railroad and its employees has been submitted to the Courts without going through the Adjustment Board procedure during the last three or four years when that procedure has been available.

So, I take it that for the purpose of this case we might really concede the defendants objection as being based upon the fact that here, as they say, the controversy has actually gone to the Adjustment Board.

Now, before dealing with the merits of that argu-
295 ment, I would like briefly to put before the Court, first, the picture of what this controversy is about and, second, a picture of this Adjustment Board and its procedure.

There has been a great deal of talk here and in the defendant's brief about the Adjustment Board as if it were a body of the same character of the Interstate Commerce Commission, or the other great Commissions which have been set up on the model of the Interstate Commerce Commission, and we really cannot progress very far in the argument until we first see what this Adjustment Board is; how it is made up; how it proceeds, and how it arrives at its awards and orders, but first of all as to what the controversy is about:

While, of course, the substantive issues of the case, are not before the Court for decision on this motion, it may be of some assistance to state what the controversy is about in order that it may be clear what the Adjustment Board has done.

The Washington Union Passenger Station was opened for use in 1908 and, from the early beginning of the time when that station was opened for use, it has been the practice that when a passenger train comes in over the Baltimore & Ohio or the Pennsylvania or the Southern and empties its passengers on the station platform, the road engine that brought that train in over the Southern
296 railway or the Baltimore & Ohio railway or the Pennsylvania railway, as the case may be, then proceeds to haul the empty cars out into the yard as it moves on its way towards the roundhouse, and it drops the empty

cars off in the place provided for the storage of such cars, and continues on towards the roundhouse, instead of having an extra switching engine move up behind the cars, couple on to them and pull them back to the yard while the road engine moves back without any cars, thus requiring two engine movements where one will do the work.

That has always been the practice and, in the same way, when the train is about to go out over the road, the engine of the Pennsylvania Railroad or the Southern Railway or the Baltimore & Ohio Railroad, leaving the roundhouse to back into the station, will back on to the empty cars on its way, and will back them into the station to receive passengers and be prepared to leave, that, as I say, has been the uniform practice for thirty two years, and while that practice was in effect in 1910, there was introduced for the first time into the contracts between the Terminal Company and its employees a provision guaranteeing the employees "seniority rights,"—so-called "seniority rights."

The provisions of that contract as set forth in the bill of complaint on page 14, exhibit A, and in the following year, 1912, there was another contract made with the engineers—the yard engineers employed by the Terminal Company, giving to them seniority rights, and those provisions for seniority rights were elaborated and extended in an agreement made during the period of Federal control between the Railroad Administration—Director General of Railroads—and the employees of the Washington Terminal Company and, finally, they were carried over into the contract of 1923, which is the contract now in force.

297

During all of those years when "seniority rights" first were written into the contract, and when the contracts were reviewed and revised, the practice continued of having those movements of the empty cars back to the yard and of pushing the trains that were about to leave into the station to receive passengers, having those movements made by the road engine and, apparently, nothing was said about it, but in comparatively recent years, a theory has been advanced by the Labor Organizations representing the employees of the Terminal, which gives a somewhat novel interpretation to the notion and the word "seniority," and I would like to call the Court's attention to that contention.

It is said that the right of seniority does not mean the right of one employee who is older in point of service to do work ahead of another employee who is junior in point of service, but that it means a great deal more than that; that it means that a whole group of employees as between whom seniority rights exist, must be construed as a group to have the exclusive ownership or right to perform a certain kind of work to the exclusion of anybody else, and the argument is that because the Washington Terminal Company recognizes seniority rights as between its yard employees, that means that its contract with those employees must be construed to give to those employees an exclusive right to perform the total volume of whatever kind of work can be conclusive on some abstract basis as yard basis, and so it is said that since the Washington Terminal Company has recognized seniority as between people who man these yard engines, that that means that it has contracted with them to give them the work of moving the cars back and forward—the empty passenger cars back and forward, which is now and always has been performed by the road engine.

In other words, as I understand their position, by making a contract with people who operate yard engines, that it will recognize seniority among those people. It is said that we will exclude the performance of any work from any other class of employees and that that means that it has by contract given up its right to permit the movements of those empty trains into and from the station to be made by the road engine.

Now, the practical consequence of accepting any such construction as that is perfectly obvious; from a railroading standpoint it would be the duplication of engine movements; that instead of being free to permit one engine—the engine that has brought the train in over the road—to move the cars back to the yard; the Terminal Company would have to bring in a yard engine and hook it on to the rear of the cars, and have two engines make the movement instead of one, which we allege is not only merely uneconomical to the last degree, but also at periods of peak travel and rush hours, would absolutely clog and encumber the expeditious operation of the terminal; nevertheless, that is the claim which was made a number of years ago by the

yard employees of the Washington Terminal Company, and that is the claim which, when it was rejected by the Terminal Company as going far beyond the possibility of any rational interpretation of the contract, was taken by the defendants here to the so-called Adjustment Board.

Now, let me call the Court's attention to the Adjustment Board.

The Court: Before you take that up, what engines do the employees of the plant operate in the yard?

300 Mr. Dickinson: They operate those switch engines or yard engines which move cars in and about the yard in the course of switching operations.

Mr. Prince: They make up trains.

Mr. Dickinson: They do some of this type of thing; if a train is to be made up from a number of different tracks; if baggage cars or mail cars or express cars have to be moved from the station to the express platform; if sleeping cars have to be pulled off of the rear of one train and put onto the rear of another train—work which they have always done from the beginning, but there never has been any recognition of any exclusive right on their part to do work of that character, and we submit that a contract has to be interpreted in the light of the practices that exist when the contract was made, and that it is also to be interpreted in the light of what was done under the contract after it was made.

Sir Edward Sugden, when he was Chancellor in Ireland, was the author of the aphorism that is basic in the law of contract: "Tell me what men have done under the contract, and I will tell you what the contract means."

This practice has gone on under this contract for thirty years and, by far the larger portion of that time there has been no question at all as to those men being entitled to any exclusive rights to do all of the work of that

301 kind, but I submit that in any event, to make such a claim on the basis of the mere word "seniority" is to spin the implicitness of the word into a filigree so fine that there is no possible basis for it.

Now, if the Court pleases, the Railway Labor Act was enacted by Congress on June 21, 1934 and, among its other provisions, it provides for two different Boards—two entirely different agencies—which have in common merely

the fact that they are both named Boards and which, perhaps, need to be distinguished.

First of all, it provides for a body known as the National Mediation Board which, I believe, has occasionally been in this Court—a governmental body composed of appointees of the President, and paid out of the Treasury, and prohibited by the statute from having any interest in the railroad industry either as employers or employees.

Now, the National Mediation Board is authorized, whenever any employee or group of employees are dissatisfied with their contracts, to intervene in the case to bring about, if possible, by agreement between the parties, some change or modification of the contract and, if that cannot be done, then the Act contains a further provision that it is not necessary to go into Court; in other words, the Act clearly contemplates and provides for a case where there
302 is a fault by one party or the other of the contract to a need for a change in the contract by an alteration of its provisions or by the inclusion of new provisions, and that the body which is concerned with such changes as the Mediation Board.

Now, the Act also sets up another Board—the so-called Adjustment Board which is here involved and as to the nature and procedure of which I wish to call your Honor's attention.

It is not like the Interstate Commerce Commission; it is not like the Federal Trade Commission; it is not a governmental body consisting of government employees at all.

The Act provides that taken as a whole and including its four different divisions which shall consist of thirty six members, eighteen of whom are appointed by the carriers and eighteen by the organizations.

The Act goes on to provide that each member of the Adjustment Board shall be compensated by the party or parties he is to represent.

It is thus a body of private and privately paid representatives of the parties to the dispute.

There is no term of office specified for the members, and the inference follows that from time to time any member of the Board may be dismissed or removed if there is action that does not meet with the approval of the group whom he represents.

303 The National Adjustment Board has functions which are described in section 3 (i) of the Act; it is there provided that if there is a dispute between a carrier and one of its employees or group of employees, growing out of a grievance or out of an interpretation of a contract concerning working conditions, then either party, without the assent or cooperation of the other, can take the dispute before this Board and this Board is authorized to make an order or award.

Now, if the court please, that is what happened in the present case; the representatives of the labor organizations called upon the Washington Terminal Company to change its practice so that all movements in or about the station should be performed by the yard engines of the Terminal Company, and that those movements by the road engines should not be continued.

The Terminal Company informed the employees or the labor organizations representing them that the demand was one which was not based on the contract but which went far beyond anything in the contract and, thereupon, the representatives of the labor organizations asked the Terminal Company to join in submitting the disputes to the Adjustment Board.

The Terminal Company did not do so; the employees took the case there anyway, and then the Adjustment Board, following its usual procedure summoned the
304 Terminal Company to file its defense—and I think I had better, at this point, go into the procedure, which is followed by the Adjustment Board.

The procedure is described in the complaint, and certain of the rules of procedure are set forth as an exhibit—exhibit E, to the complaint.

The resolution of the Adjustment Board of June 18, 1935, provides as follows: that when a so-called "submission", which is the name given by the Board to the paper which constitutes the pleading of a party—they call that a "submission".

The resolution provides: "that when a submission of both parties to a dispute has been received by the Secretary of the Board, he will immediately furnish each of the parties with the submission of the other."

In other words, under their procedure, neither party sees the pleading of the other party until it has filed its own pleading; the Board announces to the prospective defendant that the employees have filed a claim in the case of John Jones, and calls upon the employer to file his submission, as his plea is called, within a certain period of time, and after he does so, then it furnishes him with a copy of the complaint which has been filed by the
305 plaintiff.

Neither party, in other words, under their rules sees the pleading of the other party until after it has filed its own pleading.

And, the next thing, to which I wish to call the attention of the Court in connection with that body is the vast importance of this paper called the "submission," because it is more than a pleading.

The resolution of the Board sets forth in exhibit E to the complaint, and states that with the filing of the two submissions, the case is completed; that any arguments presented to the Board at the so-called hearing must be confined to the facts stated in the two submissions, and then follow the very highly significant words, in connection with this so-called hearing: "The production of evidence at the hearing is foreclosed."

In other words, the only evidence before this body, if it can be properly called evidence, consists of the statements included in these papers called "submission", each of them prepared by one party without having seen the paper of the other party.

Obviously, there is thus given no opportunity whatever to either party to cross examine or otherwise test the
306 statements of the other party or to meet those statements by the introduction of contradictory statements through witnesses of its own.

The hearing before the Board consists merely of argument; upon these two ex parte statements, each of them prepared without sight of the other, and I submit that certainly the hearing of that kind is not a hearing in the sense that we are ordinarily accustomed to think of as a hearing in proceedings at law.

Now, there is a further feature of the Board's procedure to which attention must be called because it was followed in this case.

The Act provides four cases where the Board may fail to agree upon an award because it is evenly divided, and that situation occurs as it might be expected to do, with great frequency, it might, indeed, have been the intention of the framers of the Act that the two groups of members paid by the respective parties should give full effect to any prejudices that they might have in favor of their own side, and the defendants in their briefs state that that is done, and I call your attention particularly to the language at page 20 of the defendant's opening brief where they say:

307 "The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just, and he will prevail."

Well, of course, it was foreseen that that probably would not happen in many cases, and the Act goes on to provide that where the Board divides equally and a deadlock ensues, then the Board shall agree on a neutral referee, and that has proved to be seldom possible, so the Act then proceeds to provide that in such a case the Mediation Board shall appoint a referee to sit with the Board,—the Adjustment Board, and make an award.

Now, those provisions came into operation when the present dispute was submitted to the Adjustment Board; the Adjustment Board divided apparently fifty fifty, and a referee was appointed.

I therefore wish to call the Court's attention to the procedure that is followed at this state; when a referee is named to sit with this Adjustment Board because it is deadlocked, no opportunity is given whatever to the parties to appear before that referee to introduce evidence be-

308 fore the Board or even to make an argument before it, and the referee decides the case wholly on the basis of those ex-parte and self serving original "submissions" which were filed with the Board. The parties have no access to him and never appear before him, and that is

what was done in the present case. The Board deadlocked; a referee was appointed; the plaintiff was given no opportunity to present his argument before the referee and, in due course, the referee on behalf of the Board made an award in the laconic language: "claim sustained."

The defendants have spoken about findings of fact and the importance of having an opportunity, under section 3 (p) of the Act to use the Board's findings of fact as prima facie evidence.

There are no findings of fact here; there is nothing but the phrase "Claim sustained."

There was no opinion; no statement of argument or line of reasoning by which the Board arrived at its result; no discussion of the issues or of the rational processes by which the decision was arrived at.

Now, as I say, with that picture of this Adjustment Board before the Court; with that picture of its composition and membership and method of procedure, I submit that
309 comparisons and attempts to deal with the Board on the same basis as if it were the Interstate Commerce Commission must wholly fail.

What place has the Interstate Commerce Commission in a discussion of a body such as I have described? What possible analogy is there between such a body and the great quasi-judicial tribunal which proceeds with practically all of the safe-guards of a Court of law?

If this case raised an issue about an order of the Interstate Commerce Commission or an order of the Federal Trade Commission or an order of any of those other great quasi-judicial bodies, then we would not be making the argument we are making here, and there might be some grounds for the contentions of the defense by the defendants but I might say in this connection that we are not here in this Court asking the Court to review what the Adjustment Board did; we are simply saying that a body like the Adjustment Board, composed as it is, acting as it does, and employing the procedure that it employs—that the existence of a body of that kind and the fact that that body employing that procedure has reached what it calls an "award" does not impose any obstacle to the rights of the plaintiff in this case or the parties to the contract to have the meaning of that contract adjudicated according to its

legal significance in a court of law and according to
310 the forms and guarantees of legal procedure.

We are not saying that the awards of the Adjustment Board is something that we are here complaining about; we are here on our contract, and we are here on our contract because we take the position that the fact that there is such a body as the Adjustment Board, being the kind of body that it is, does not oust the Court of the jurisdiction they would otherwise have in the enforcement and protection of contract.

If the Adjustment Board were a different kind of body; if the Adjustment Board were differently constituted, or if it followed a different procedure then the case might be otherwise, but that case is not presented.

All that we have here is what we actually have—which is a body like the Adjustment Board acting in the manner in which it acts, and we say that the existence of that kind of a body acting in that kind of way cannot be held to oust the jurisdiction of the judicial courts.

If the Court pleases, that brings me about half way in my argument, and if you would care to have me continue for a few moments, I will do so.

The Court: May we not adjourn now and finish tomorrow morning?

Mr. Dickinson: I think the logical break in the ar-
311 gument occurs at this point.

The Court: We will adjourn until tomorrow morning at 10:00 o'clock.

Mr. Mulholland: May I ask if Your Honor has a copy of our reply brief? I was not informed that this is in the files; there should be three briefs.

The Court: Two of them are not so brief.

(Whereupon, at 3:20 o'clock p. m. of the same day, May 15, 1939, the hearing was continued until 10:00 o'clock the following day.)

312 Court House Building,
Washington, D. C.,
May 16, 1939

Hearing in the above-entitled matter was resumed, pursuant to the recess, at 10:20 o'clock a.m.,

Before O'Donoghue, J.

Appearances:
Same as heretofore noted.

313 *Argument of Mr. John Dickinson on Behalf of Plaintiff* (Continued)

Mr. Dickinson: If the Court please, at the point at which I interrupted my argument yesterday, I was describing the nature and composition and procedure of the so-called "Adjustment Board," an agency which proceeds without hearing and decides without making findings of fact.

I referred in particular to one sentence of the rules of the procedure of that Board to which I wish to again call your Honor's attention and which I wish to reemphasize this morning; it is printed at page 42 of the complaint, and I call Your Honor's special attention to it—a rule of the Adjustment Board which provides that introduction of evidence at the hearing is foreclosed—at page 42 of the complaint.

Now, however progressive one might be in one's legal thinking; however favorable to the rights of labor and however sympathetic with the development of administrative law and the powers of administrative tribunals, it seems clear that a body such as I have described goes a far distance beyond anything in the nature of a quasi-judicial tribunal that we have hitherto been familiar with in our constitutional system and, in order to complete the picture of this Adjustment Board, I would like to add a further stroke from the brief of our friends the defendants them-
314 selves, which will further serve to acquaint the Court with the characteristics of the Adjustment Board, the powers which it presumes to exercise and its conceptions of those powers which the defendants have.

Let me read a few sentences on page 67 of the defendant's main brief; that is, the thick blue brief, where they describe

the functions of this Board and what it is supposed to do; I refer to the paragraph beginning at the top of 67:

"The National Railroad Adjustment Board performs a function entirely different from that of the Courts."

Well, of course, that is clear; every quasi-judicial body performs functions different from that of courts and, consequently, that sentence in and of itself does nothing to emphasize the point that I am making, but let me go on:

"The parties before it, carrier and employees, are parties to a continuing relationship. The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally the consideration of present legal rights," - - -

And here comes the language to which I especially
315 call to your Honor's attention:

"But the Board's function is not to adjudicate as to the rights but to adjust the dispute regarding them in such manner that the parties may in future be enabled to conduct the business of Interstate Commerce without friction and without interruption."

"The Board's function is not to adjudicate as to the rights," and, in connection with that sentence, let me quote another sentence on the preceding page—page 66 of the same brief, which reads as follows:

"The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement."

"Not to make an interpretation of the agreement!"

Now, if your Honor please, that is the defendant's own language, and we submit that it is significant language because, if it means anything, it means that the function of this Adjustment Board is such that it has no legal obligation to construe and determine and apply the existing legal rights of the parties under their contracts—contracts that they have solemnly and voluntarily entered into, and contracts which are legal contracts in the eyes of the law, but that this Board, if it deems desirable may handle the dispute by disregarding those contracts and ignoring the rights under them and "adjust" or handle the disputes in the
manner which in its own uncontrolled discretion it
316 regards as conducive to the future relationships of the parties.

Now, that is what the Board has done here in our case; the Board has gone beyond the terms of the contract and, because it apparently cherishes an ideal or theory that it will be a good thing for all of the railroads of the country if they were to have a strict limitation of the working road crews, so that they may not be permitted to do anything, no matter how simple and natural, in and about the yards, in order to give effect to that theory of what the Board regards as a "good thing" for the railroad industry as a whole throughout the country, they have gone beyond the terms of the contract and they have disregarded the legal rights of the parties, and the defendants now come into Court and, in this language which I have read, say that as a matter of fact that is what the Board is there to do.

Clearly, an agency of that kind is something new in the great galazy of administrative tribunals with which we are becoming more and more familiar; something new even in that new field, and none of the precedents which are available from the decided cases as to quasi-judicial tribunals and the manner of reviewing their orders have any application to the existence of this kind of a body which I have been describing.

317 Now, at this point, let me recur to the point which I undertook to make yesterday—that the plaintiffs here are not seeking to review the action of this Adjustment Board; we are in accord on our contract, and the only way in which the Adjustment Board comes into the picture is in connection with whether or not the fact that it is there has raised a bar to an action on a contract that we otherwise would have, and the defendants agree that we are in accord on the contract.

They say, on the bottom of page 51, for example, that these claims which we are contesting—claims made by the employees—are claims "based upon the agreement of 1923—not upon the order of the Board."

That is at the bottom of page 51 of the main brief and, as a matter of fact, we have set forth in our own brief, in the first section, pages 2 and 3, repeated statements from the brief of the defendants in which they admit that this is an action upon a contract.

So that, as I say, the only way in which the award of this Board is involved is in connection with the question as to

whether or not it interposes a bar to a form of proceeding that otherwise would clearly lie.

Now, it seemed to me in the brief colloquy which I had with counsel for the defendants yesterday, that they
318 are reluctant themselves to urge that the existence of this award of the Adjustment Board ousts in and of itself the jusisdiction of the Courts to entertain this proceeding.

They shift their ground; they do not go that far, but they say, as I understand them, that it is not the existence of the award of the Adjustment Board that ousts the Court's jurisdiction here, but this section (p) of the statute; it is the provisions of section 3 (p) of the statute which they claim has the effect of ousting the Court's jurisdiction here, and therefore I wish to invite the Court's attention to section 3 (p) which, as your Honor may remember, provides that if the carrier does not comply with the award of the Board, the employees in whose favor the award is issued may bring an action in a District Court in which action they will have special procedural advantages of certain kinds and the argument advanced by the defendants is that since an employee may bring a proceeding under section 3 (p) that therefore the Courts are permanently closed to any proceeding by the employer, and they undertake to base that argument upon the familiar analogy in the case of quasi-judicial administrative bodies that where there is some special statutory review procedure provided for an administrative determination, that the determination can
319 only be reviewed in accordance with that special statutory procedure. Now, it seems to me that that argument would not hold water for two conclusive reasons, and the first of those, to which I have already referred is that, of course, this body—this Adjustment Board—is not a quasi-judicial tribunal; its orders are not quasi-judicial determinations, and there is nothing that can properly be reviewed by any Court under statutory review procedure or otherwise because the Board makes no record, the Board makes no findings and, consequently, there is not that basis for a review under statutory procedure which exists in the case of orders of bodies like the Interstate Commerce Commission and the Communications Commission and similar tribunals.

The second point is that the defendants themselves, in their main brief, assert on their own motion that this procedure under section 3 (p) of the statute is not a review procedure, and I would like to call the Court's attention again to their blue brief at page 9, about half way down the page, where they say:

"In other words, the procedure established by the Act is not a procedure for review."

In other words, that the procedure established by the Act, namely, the procedure under section 3 (p) is not a procedure for review, and then they go ahead in the next
320 argument and say that that is the reason why we cannot maintain our present action because we are seeking to get the review "as the gist of the plaintiff's action in this case is to secure such review, its complaint is fatally defective."

In other words, the reason they say we cannot have an action here is because section 3 (p) does not provide for the review.

Now, then, whatever inconsistency there may be in that statement of theirs—inconsistency with the balance of the argument, I think on the whole that throughout their brief they do present a consistent and convincing picture of the nature of the procedure under section 3 (p), and I am going to rely entirely on what I say about section 3 (p) on the analysis of that procedure which is contained in this blue brief of the defendants between pages 49 and 54 because we, on the part of the plaintiff, agree fully with that analysis, and let me begin by reading the language used by the defendants on the top of page 53 as follows:

"Although the statute speaks of the action"—that is to say, the action under section 3 (p)—"as one to enforce an order of the Board, and although the procuring of such an order is undoubtedly a prerequisite to the use of the statutory procedure, it is apparent that the mere existence
of the order in no sense establishes that plaintiff in
321 such a suit has a cause of action. He must plead more than the order. He must prove more, and a judgment of enforcement by no means follows as a matter of course from the order's issuance. His cause of action before the Court"—that is, under section 3 (p)—"is dependent upon the agreement out of the interpretation of

which the alleged dispute arose. The existence of the order of the Board merely assists him in preparing and proving that cause of action," and I repeat, I call especial attention again to the language, "his cause of action before the Court (under section 3 (p)) is dependent upon the agreement out of the interpretation of which the alleged dispute arose." Now, those are the defendants own words, and they state as plainly as language can state that the procedure under section 3 (p) is a proceeding upon the agreement—a proceeding on the original contract between the parties in which this so-called order or award has no probative effect; has only the effect of assisting, as they put it, the plaintiff to prepare his case.

The section 3 (p) procedure is a special variety of suit on a contract, conditioned upon their having been a previous order of the Board and offering unusual and special attractiveness to the employees in order to induce them to bring that form of action for reasons that I will go into before I conclude my argument.

322 Now, the defendants are not content to leave the matter there; they spell out still further why this proceeding under section 3, (p) is not a proceeding on an order or award, but is a proceeding on an original contract, and the reason why they say it is on an original contract and not on the order is apparent from some language on page 53 of their brief.

They are talking about these claims by the defendants in this case which constitute the reason why we are in Court, and they say that those individual defendants, in making their claims, base the claims on the contract of 1923, and not on the award of the Board, and they go on to say this: "Plaintiff has failed to show how the existence of the Board's order affects its legal rights in any way."

We fail to show it because, as a matter of fact, we don't think it "affects our legal rights in any way". They say further: "the plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

And that is exactly what we think. "If this Court should, without more, grant a declaratory judgment holding the order of the Board invalid, the plaintiff would still be in the same position in this regard."

We do not ask the Court to grant a declaratory
323 judgment on the order.

"The plaintiff would still be in the same position", but the language I specially wish to emphasize is that sentence: "The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

That is right, and that is why the procedure under section 3 (p) must be a procedure on the contract and not upon this order; it does not create or effect or alter legal rights according to the defendants' own contention, and one final sentence from their brief on that point to which I wish to refer is to be found on turning over the page about half way down page 54 where they say in parentheses—"(for the reason that the order establishes no rights.)"

Now, if this order establishes no rights; if it affects no rights, clearly section 3 (p) cannot be a proceeding to enforce the order and that, no doubt, is why they said, on page 9, that it was not a proceeding to enforce the order.

It is a procedure on a contract in which this Board has the function of assisting the plaintiff to prepare and prove his case, as they say, and if that is the only effect that the award has, clearly a suit under section 3 (p) is a
324 suit on the contract, and so what we have got here is the question of whether or not the special statutory suit on a contract provided by section 3 (p) is of such a nature and so exclusive as to oust the jurisdiction of the Court to entertain all other kinds of remedies on the contract—that is the real issue—it is not an issue between the statutory review procedure of a quasi-judicial administrative order as against the declaratory judgments procedure, but it is a question of whether or not one form of statutory procedure upon a contract, namely, under section 3 (p), is to be held exclusive in such a case as to exclude other remedies on the contract.

Now, one question that might very well arise in your mind as to why the defendants should take this position is that if the award by the Adjustment Board is really, from a legal standpoint, such a tenuous thing as they say it is—why should they take the position that the order or award of this Board creates no rights and affects no rights and leaves the parties in exactly the same position in which they were before the award was made?

Well, I think the answer is pretty clear; I think the explanation is pretty clear.

In the light of the description which I have given
325 here of the composition of this Board and of the manner in which it proceeds and the regard, or lack of regard in which it holds judicial procedural requirements, it seems entirely clear that the defendants are really unwilling to come into Court and expose themselves and expose this Board to the charge which would certainly have to be made of flagrant unconstitutionality if an attempt were made to argue that the awards of this Board constituted binding adjudications of rights.

The point would be so clear that it would admit of no answer, and that is why they take refuge in the position that the awards really do not affect legal rights, and that is why they have to say that the procedure under section 3 (p) is not a procedure to enforce the award; that it establishes and affects no rights, but it is simply a procedure on a contract in the course of which the award operates "to assist the plaintiff in preparing and proving his case."

Now, with that point established, what possible ground is there for argument that section 3 (p) establishes any exclusive remedy on a contract of employment so as to oust other forms of remedy including the declaratory judgment procedure?

There is no possible ground for arguing that it
326 operates to exclude the declaratory judgment procedure unless it is exclusive in such a sense as to exclude all other remedies on the contract, and what possible ground is there for arguing that section 3 (p) has that effect?

As a matter of fact, it is at variance with the whole theory of section 3 (p) which is advanced in the defendant's brief.

They say, for example, that the rights of the parties today under their contract or what they were before the award.

They say that the award has no effect on those rights and they say that all that section 3 (p) does is to give a special remedy to one of the parties.

Now, how can you say that an option which is given to one of the two parties on a contract to bring a suit would be procedure to enforce that contract and operate to exclude

all other remedies on the contract and operate to exclude the other party to a contract from having any opportunity to come into Court on it at all.

Now, the very idea of exclusiveness seems to imply that a party may not use one remedy because another remedy has been given to him but if, instead, the other remedy,—the section 3 (p) remedy is given, not to him, but to somebody else—how can he be said to be excluded by a remedy which is not available to him at all?

327 And I submit that to apply or construe section 3 (p) as an exclusive remedy on the basis on any such reasoning as that would be to block the principle of statutory construction and, after all, this is simply a question of statutory construction—that would be novel and unheard of and contrary to the most elementary notions of fair dealing and justice.

Now, let us come at this point to the argument which the defendants made yesterday and which they make in their briefs, that if the procedure under section 3 (p) is not held to be exclusive, they will be deprived of certain valuable rights which would be available to them if the procedure under section 3 (p) were exclusive.

Your Honor may remember that I interrupted Mr. McEwen to ask what rights he had in mind and he said he had in mind the special procedural advantages which are given to the employees who bring a proceeding under section 3 (p), and that section does give certain procedural advantages to the complaining employee which I will enumerate in a moment, so that their argument is that if it is held that the declaratory procedure judgment will lie, so that the employer may become the plaintiff, as he is in a declaratory judgment proceeding, the employees will be deprived of the advantages which they would have of

328 being the plaintiffs in a proceeding under section 3 (p).

Now, what are the special procedural advantages? They are four in number:

The Act provides that a proceeding under section 3 (p) may be brought in a District Court in the United States for the District in which he resides or in which is located the principal operating office of the carrier or through which the carrier operates.

In other words, if an employee brings a proceeding under section 3 (p) he has a fairly wide range of Federal judicial Districts to choose from.

He has the advantage of a wide choice of fora.

Then, the second advantage that they referred to is the two year statute of limitation; they say that if they sue under section 3 (p) they do not have to make up their mind as to whether or not to sue for two years because the statute gives them the right to sue for that entire period.

The third advantage is that in a suit brought under section 3 (p), if the complaining employee wins, he is entitled to recover attorney's fees.

And, finally, if he loses in such a proceeding he will not have to pay costs, but costs will be paid for by the
329 United States.

They say that those advantages are guaranteed to them if they sue under section 3 (p), but, of course, in order to get those advantages they have to bring the suit themselves as plaintiffs and, therefore, if the Court should hold that the defendant may sue in a declaratory judgment proceeding, of course, the employees would no longer be in a position of plaintiff and would not, they say, be in a position to claim those advantages.

Now, if Your Honor please, I submit that if you look at that argument, namely, that a declaratory judgment proceeding will not lie if it operates to deprive the other party of advantages which the other party would have if he sued as plaintiff—if you look at that argument and if that argument should be considered to be sound, it would have the effect of destroying the declaratory judgment procedure in practically every case to which it is applicable because the very purpose of the declaratory judgment procedure is to enable a prospective defendant to make himself the plaintiff, and, by so doing, deprive the original plaintiff of advantages which every plaintiff in a law suit always has, and let me illustrate:

Take, first of all, this matter of the selection of
330 a forum. Now, the plaintiff selects the forum; he has the advantage of doing that, but if a declaratory judgment procedure is introduced, as it has been, so that the party who would otherwise be the defendant may put himself in the position of a plaintiff, why, then, he may

select the forum and, to that extent, destroy the advantages that the original plaintiff would have of selecting the forum, and the same thing is true about the statute of limitations.

The defendants seem to regard this two year statute of limitation as a guarantee of freedom from litigation for two years.

Well, now, anybody—any prospective defendant who brings a declaratory judgment proceeding cuts off the advantage that the original plaintiff might have of sleeping on his rights during the entire period of the statute of limitations, and with regard to those attorney's fees and costs, there, again, all that would happen here, if the declaratory judgment procedure would be held to be applicable, would be exactly the same thing that happens whenever the declaratory judgment procedure is followed, namely, that if the prospective defendant is foolish enough to turn himself into a plaintiff under the declaratory judgment procedure, he thereby cuts off the rights and advantages which
331 the original plaintiff might have had had he sued as the plaintiff, and which he could have obtained by suing promptly and diligently, and I might suggest in passing that in this case, under the Federal rules, and under the statute, I see no reason myself why these defendants here could not right here and now obtain for themselves all of those advantages under section 3 (p) by filing a bill in the nature of a cross bill or a bill which should be consolidated with the present action under section 3 (p), to enforce the award of the Board or to enforce the contract in the light of the award of the Board. I see no objection to that at all.

And, of course, under those circumstances, if they win, they can get the attorney's fees, and, if they lose, the United States Treasury would pay the costs, so that they would not really be deprived of anything.

So that those supposed disadvantages to the defendant which they claim would accrue—this supposed deprivation of rights which they claim would accrue as a result of holding that this declaratory judgment procedure is applicable, turns out to be not merely trivial and unimportant but actually non-existent but, if your Honor please, even if those disadvantages to the defendants, instead of being trivial and unimportant and non-existent were really and

actually, what are we to say as to their weight in
332 the balance as compared with other and more momentous disadvantages which would follow, not merely to plaintiffs here, not merely to the railroads, but to pretty fundamental principles, if it should be held that the plaintiff has no access to the Courts in this proceeding?

This case really involves a grave question; it is a question which goes down below the important question of labor relations and of labor policies; it goes down below those issues, if the Court please, to the question of whether or not in our domestic law—in the law of the land—as seems to be happening in the field of international law—the maxim that pacts are to be acted upon is to become a dead letter and a thing of the past, and I want for a moment to point out to the Court the consequences of the argument that the defendants are advancing here.

Now, that argument rests upon three propositions, as I see it:

The first proposition is that the Railroad Adjustment Board is not a judicial, or even a quasi-judicial body; that it is a body which, in making its awards, is perfectly free to ignore the existing contracts of the parties and make a settlement in what it regards as the best interests of
333 the parties, and that in doing so, of course, it can readjust the relationship between the parties in such a way as to cut off their right to enjoy their contract right, and that the Adjustment Board, being that kind of a body and, in spite of its non-judicial character, and in spite of the fact that it does not even pretend to give effect to contract rights, nevertheless, if that Board has made an award, even though the award does not have any effect on the contract rights of the parties, it does have the effect of barring permanently and completely the right of the employer to come into Court and ask for an interpretation and enforcement of his contract.

And the third proposition is that the other party—the employee—may come into Court under the specially advantageous procedure of section 3 (p) and enforce his rights under the contract if he wants to do so.

That is what the argument really comes down to—that the award of the Labor Board does not create legal rights; oh, no; it does not affect legal rights—oh, no—but what it

does do, once it has been made, is to bar the right of one of the two parties to the contract to any judicial remedy on that contract and leave the door open simply as a remedy to the other party on the contract if that party wants to resort to the Courts, for the enforcement of its con-
334 tract rights.

The effect which they give to an award of this non-judicial body is as an estoppel; it comes in and stops; cuts off, bars, blocks, the right of one of the two parties to the contract forever to judicial relief.

Now, let us look at what the practical consequences of that scheme of procedure would be:

If a carrier has a contract with a group of employees and if, thereafter, the employees, as human beings sometimes have a way of doing, advance claims which are entirely beyond the scope of the contract and are unsupported by it, then those employees can, against the will of the carrier, under section 3 (i) of the Act take the dispute to the Adjustment Board and the Board, in making its decision, is not bound by the contract but simply bound by what it regards as the best interests of the future relationships of the industry and, after the Board has done that, say the defendants, the Courts are thereafter closed to the carrier to enforce any rights or to ask for the interpretation of any rights under the contract.

Now, what can be the object and what possibly can be said in defence of any such scheme of procedure as that, which would make the action of an irresponsible and non-judicial body effective to bar one of the two parties to the contract from any rights upon its contract?

335 Why, obviously, the whole object, if not the only object is to limit effective resort to the Courts by employers for the determination of their legal rights under their contracts with their employees.

The scheme amounts to establishing a device whereby one party to a contract, namely, the employer party to the contract, can be barred of access to the contract by an unilateral one sided action of the other party to the contract in taking a case before the Adjustment Board.

Now, why are the defendants so anxious to bar access of the plaintiff to the Courts? I think the answer appears in a sentence at page 37 of their main brief—a sentence

that I might describe as an ominous sentence—the fourth line on page 37: "The orders of the Board find their primary sanction in the collective economic bargaining power of the employers,"—an euphemism of the right to strike.

The defendants frankly say that according to their construction of the Act, they can keep the employer out of Court by going to the Adjustment Board and that they themselves regard the right to strike as the primary sanction of the orders of the Board instead of going into Court under the procedure that is available to them under section 3 (p).

Obviously, if the Court please, they have no interest in getting into Court under section 3 (p), and the reason is clear: they say that the Adjustment Board may make an award that can disregard and go beyond the terms of the contract.

Now, if the Adjustment Board has made an award in their favor which disregards and goes beyond the terms of the contract, and if they went into Court under section 3 (p) on the contract, as they say they would have to do, the Court would obviously act upon the award to the measure of the contract and, therefore, there is no inducement to them to do so; there is every inducement the other way—against their submitting awards to a judicial determination under section 3 (p), and yet they say that we ought not to be allowed to go into Court because they have a right to go into Court under section 3 (p), and that our rights will be sufficiently taken care of if we sit back and wait for them to go into Court under section 3 (p)—wait, your Honor, until the vexations of the spirit can no longer endure—they will never go into Court under section 3 (p) because if the award is the kind of award they like, it is an award that goes beyond the terms of the contract, and they know perfectly well that if they go into Court under section 3 (p), the Court will cut the award down to the measure of the contract, so where are our legal rights going to be protected in court?

Our rights are threatened. They say, as a matter of fact, "what are we worried about?" We are worried about the claims that these employees are putting in every week, claiming pay for work that they have not done. That is why we brought this suit; we brought this suit because

those yard employees, at the end of every week, put in a bill for not doing the work of moving those trains, and that because those trains are being moved by the road engines, and the bills are piling up and accumulating; we have got to save money to meet them, and that is precisely the kind of situation that the Declaratory Judgments Act was meant to save plaintiffs from having to undergo.

Oh, no; we cannot depend for the determination of our legal rights upon waiting until the defendants bring a proceeding under section 3 (p). They know why they won't bring a proceeding under section 3 (p), and the question simply is whether or not there is open to us our access to the courts like any other citizen, to come in under this Declaratory Judgments Act and ask the court to determine for us the proper construction of a contract under which the claims for money payments are being insistently made against us which we claim are not due under the contract.

Well, now, going back to the question of the funda-
338 mental nature of the procedure for which the defendants are arguing here.

They say, as I indicated a moment or two ago, that so far as relates to the employer, he has no right to go into Court. His right is barred by the approach which has been made to the Adjustment Board and that, as far as they are concerned, the employees, from their standpoint, the orders of the Board find their primary sanction in the right to strike.

Now, that is the whole heart of the matter, and what it means is that the scheme of procedure that the defendants are asking this Court to accept and construe as the procedure provided by the Railway Labor Act, is a procedure which denies forever the legal enforcement of a contract by one of the two parties to the contract and leaves the other party to the contract free to inforce its claims by the right to strike, and I submit that no scheme of procedure could be imagined that would more effectively eliminate the importance of the decision of controversies according to law and according to legal justice than that kind of procedure.

It may be, of course, that we are entering upon a period inside of nations, as well as among nations, where the notion that issues ought to be settled in accordance with justice and in accordance with law and in accordance
339 with the plighted word of the parties is falling into

disrepute, and that we are becoming infected everywhere with the idea that all disputes should be settled by force.

Certainly, the defendants' brief is replete with expressions of dislike and distrust of the courts. At the bottom of page 66 of this brief they say, as a matter of fact, that court procedure in accordance with the methods of legal justice is not a satisfactory way to settle disputes—the last sentence beginning on that page:

"It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future."

Well, I don't know, but are we to suppose that "cordial relationships between the parties in the future," will be promoted by the insistence upon the primary sanction of collective economic bargaining power?

And then they say, at page 43 of their brief that if they are compelled to submit the awards of the Adjustment Board to the adjudication of the courts, which is a matter that we are not asking them to do at all anyway—

340 then, they say:

"The result would be an increasing unwillingness"—down at the bottom of the page—"unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes."

In other words, they would rather fight it out than to go to Court.

It reminds me of a remark of the late Will Rogers about an international controversy; he said: "We were so sure that our cause was just that we simply refused to submit it to judicial procedure."

Now, reading that statement that I have just read there about increasing resort to the familiar weapons of industrial warfare—reading that together with the statement that the orders and awards of the Adjustment Board find their primary sanction in the right to strike, the apparent meaning is this, and I could get no other meaning out of it,

that the employees will consent to go before the Adjustment Board only if it is understood that they shall be in a position to enforce the orders of the Board by their right to strike but that if, on the other hand, the way is open to the other party to obtain a judicial determination of his rights under his contract, then the employers will not go be-
341 fore the Board at all but will strike in the first instance.

If such a view as that is accepted, it seems to me that contracts arrived at by collective bargaining between employers and employees mean only what the collective bargaining power of the employers can make them mean.

Under such a view, contracts arrived at by collective bargaining between employers and employees, if the Court please, are mere "scraps of paper".

If there is no legal way of enforcing rights under a contract then, from any legal standpoint, there is no legal contract, and if the door is closed to the employer having a legal remedy on his contract why, obviously, if, in addition to that you add the element of this threat to strike, the contracts between the employer and the employee are not contracts at all but they are simply whatever economic pressure the employers from time to time can bring to bear upon the employer—whatever that economic pressure can make those contracts mean and, in this day, when so much is said about the collective bargaining and so much emphasis is laid upon its importance, and the appeal to justice is made that rights of collective bargaining should be exercised, it does not seem to me to lie in the mouth of the employees to come into Court and claim that the statutes which guaran-
342 tee and protect the right of collective bargaining are to be so construed as to exclude the employer party to the bargain from having any legal right on his contract, and that is why as I said to the Court a moment or two ago, it seems to me that this case raises a very deep and fundamental issue.

The question is whether or not railroad employers under collective bargaining agreements, have any rights to judicial remedy and judicial protection to their contracts.

If they have such rights they can, under the statutory situation, only be protected by holding that this action will lie, and if the action will not lie, then contracts between a

carrier and its employees are not in contemplation of law contracts under which the employer has any legal rights at all.

Now, there is just one other point that I would like briefly to bring to the attention of the Court, and I refer to defendant's argument advanced here yesterday that if the declaratory judgment procedure is held to be available to employers under their contract, that then the scheme and policy intended by Congress in the Railway Labor Act will be defeated and destroyed.

As I said at the very beginning of my argument,
343 we are not here to defeat or to destroy any power or policy of Congress; we are not here to defeat or destroy anything which guarantees collective bargaining or the rights of labor.

We decline to accept the view that the policy of the Congress would be destroyed by holding that one of the parties to a contract has a legal remedy on that contract where the other party has no legal remedy because we are inclined to believe that Congress by the Railway Labor Act, intended to adopt a policy or prescribe a scheme of procedure which makes collective bargaining a sham and a mere mask for unrestricted economic pressure.

On the contrary, I believe that the provisions of the Railway Labor Act, if read with care and if properly understood, disclose an altogether different policy and purpose on the part of Congress, a policy and purpose which would be effectuated and aided if it is held that the present action may be maintained.

The purpose of the Railway Labor Act can not be understood in any such miserable and paltry and discreditable way as to imagine that its object is to throw obstacles in the way of resort to judicial procedure.

That is not the purpose of the Act; it has a larger and more beneficient purpose; it has a purpose which is
344 apparent throughout all of its provisions, which gives to those provisions an effect and meaning that they otherwise would not have, and that purpose is to place restrictions around, and regulations around, and limitations upon—while not of course abolishing the right to strike—if you will read the Act from cover to cover, it seems to me that the only basic, sensible, intelligent view that can be

obtained of its purpose is that through all of its provisions it is aiming, not to abolish the ultimate right to strike but to hedge it about with provisions which will lessen the likelihood that it will be resorted to.

That is the purpose of the Railway Labor Act, and not the establishment of blocks against resort to judicial procedure.

For example, there can be no doubt whatever that those provisions of the Railway Labor Act which deal with the Mediation Board and which describe the powers and purposes of the Mediation Board—a very different body from this Adjustment Board—have as its purpose the interposition of obstacles in the way of the right to strike.

When the carriers cannot agree on wages or working conditions, or when one side—the employees or the carriers' ask for a change in the contract rights, then the ma-
345 chinery of the Mediation Board comes into play, and provision after provision is piled up in the Act, designed to place obstacle after obstacle, and delay on delay in the pathway of reaching that ultimate point of disagreement where the right to strike becomes effective.

I submit that if we look at the provisions of the Railway Labor Act with regard to the Adjustment Board we will reach precisely the same objective. These small grievances and controversies which are to go to the Adjustment Board may conceivably lead to differences which if unsettled will bring into play a resort to the right to strike.

That is perfectly true and, so, in the first instance, the Act sets up the Adjustment Board and then the Act goes further: suppose that after the Adjustment Board has acted, the dispute continues—what is the action then? There is where section 3 (p) comes in; the Act holds out a bait; it holds out an inducement; it holds out a specially persuasive appeal to the employee, if he wants to use it, to come into Court and settle his disputes there instead of resorting to this collective economic bargaining power which they now come in and say is the "primary sanction" of the awards of the Adjustment Board.

Now, I think that if section 3 (p) is understood in
346 that light, it seems clear that it has no such effect and need have any such effect as defendants claim

that it has in excluding other forms of judicial remedies that are available.

If section 3 (p) is an inducement or an attempted inducement, weak though it may be to the employees to resort to Court procedure because they are given special advantages, why in the world does the holding out of that inducement affect in any way or how can it be supposed to affect the availability of other forms of legal procedure to the other parties to the contract when, as a matter of fact, a denial of those other forms of procedure to the other party to the contract would amount, as I have shown, to a total and complete denial of his right to have legal relief on his contract.

It seems to me, that the Railroad Labor Act is a statute of peace and not a statute of strife; that its every provision is designed so far as possible to substitute some form of settlement by law and justice for a settlement by force and violence and, certainly, we are not going to accomplish that result by bottling up access to the judicial tribunals and by holding that a party to a contract is completely excluded from any right of access to the courts to give him his rights under the contract.

The Court: Mr. Dickinson, the plaintiff does not
347 contend here that this Act is unconstitutional.

Mr. Dickinson: No.

The Court: That is not the purpose of the complaint?

Mr. Dickinson: No, not at all.

The Court: Suppose either party submits a "submission", as it is called, to this Adjustment Board, and suppose the decision is in favor of the employer or the carrier and the railroad company attempts to enforce that, how can they do it if the employees won't abide by it?

Mr. Dickinson: Under those circumstances I suppose that the railroad company would certainly have the right to such legal remedies as are available; for example, if the Board decided that only a certain sum of money was due from week to week to a particular class of employees, and the employees continued to demand more, the railroad would be protected if it only paid them the amount that the Board said it had to pay them, and if they would not work for that why, they would leave.

The Court: Be dismissed?

Mr. Dickinson: Yes.

The Court: So that, plainly, if the decision of the Adjustment Board is in favor of the railroad, the railroad does not need any legal remedy; it has the actual remedy of refusing to let them work less hours—

348

Mr. Dickinson: (Interposing) Of course—if I may interrupt your Honor at this moment, it seems to me—

The Court: (Interposing) They have the absolute power over the employers, have they not?

Mr. Dickinson: Railroad company has an absolute power over the employers?

The Court: Yes.

Mr. Dickinson: I don't think so. It seems to me, for example, that if a decision of this Adjustment Board departed from the contract between the employer and the employees, in a sense adversely to the employees—in other words, if the Board went ahead and made a decision that was adverse to the employees, that the employees, in the event that they in any way thought they were damaged by that decision, would have exactly the same right to come into Court for a declaration of their rights under the contract that the plaintiff has here.

The Court: I don't understand that defendants claim any such right as that.

Mr. Dickinson: No, they don't; they say they have not any such right, but my point is that section 3 (p) of the Act establishes a very special kind of procedure which has nothing to say, one way or another, about the availability of what you might call the general legal remedies.

349

The Court: I want to get your view point on that. Now, then, you spoke about the legal remedy afforded to labor under section 3(p); that is only where the decision is in favor of the employees and against the employer?

Mr. Dickinson: That is right.

The Court: Now, is that a legal remedy under section 3 (p) or is it a proceeding in Court by way of getting execution on the award by arbitration against them?

Mr. Dickinson: I would like to say two things in that connection, Your Honor; in the first place, the defendants, having insisted, as I developed for you in my argument, that a proceeding under section 3 (p) is not a proceeding in execution of an award or to enforce the award; that it is

a proceeding, as they say, on the contract, but I would like to say a word about this matter of arbitration: I think it might be significant to note that the defendants have in no way advanced the claim that this Adjustment Board is an agency of compulsory arbitration, and I suspect that if the history of those forces which were at work when the Act was framed were investigated it would be found that the labor champions in this country are extremely loathe to advocate anything which might be
350 construed as compulsory arbitration.

The Court: What meaning would you put upon the awards?

Mr. Dickinson: The meaning that I would put upon the award would be that the award shall be final and binding upon both—

The Court: (Interposing) Both parties to the dispute?

Mr. Dickinson: Well, as a matter of fact—

The Court: (Interposing) What does the word "final" mean?

Mr. Dickinson: If your Honor please, there has been a great deal of dispute as to that word, even before the Act was passed. It reminds me a little of the debate in the Constitutional Convention on the question of direct taxes. There is one sentence in there which reads as follows: "Mr. Kind inquired what was meant by the words "direct taxes" and no one answered.

Now, this question of what is meant by the words "final" and "binding" has been raised from time to time, and no one has answered, but I certainly don't think it can be maintained that this statute is a compulsory arbitration statute for this reason:

351 The very idea of arbitration, in a way, involves both parties coming into the arbitration. Now, here this Board can make an award on a motion of one party and, certainly, if you set up a Board and give it power to determine conclusively the rights and obligations of another party who does not submit to the Board and who does not appear before it, then I think there would be a question of the constitutionality of the Act; I would challenge it immediately.

The Court: That is the first question; that is, if one party would invoke this Board's action, and if the other

party does not care to go in, the question comes up, what right does he have?

Mr. Dickinson: And can it constitutionally do so?

The Court: It says they must; that comes to the fundamental question that you say is so important as to the new and modern way, which regards itself as having an interest in such matters; that might even be superior to the contract of the two contracting parties and their respective rights, and so on.

Mr. Dickinson: Yes. However, as to the power of Congress, I certainly think it would be beyond anything that has been decided to pass a statute that would enable a Board consisting of those private people to wipe out con-
352 tracts and impose new obligations on people.

The Court: That is a question that is in the air not only in this country but in other countries,—the modern commissions and the set up in regard to handling labor relations, private contract relations, working relations, and so forth and so on.

Mr. Dickinson: In what country?

The Court: Spain.

Mr. Dickinson: Spain?

The Court: Yes, and recently in Brazil; it is surprising to see how far other countries are taking up the same principles that this country was founded on, and are taking up these matters and going further.

Mr. Dickinson: Brazil is a facist country.

The Court: Whatever it may be, there is an idea, and it is in the Congress, and it is in the Acts of Congress and in these different Boards, and so on.

Mr. Dickinson: But like so many other questions, it is a question of degree how far they can go and still leave something of the Constitution.

The Court: I appreciate your argument, and it has been very helpful, but I will not decide this question now; it is an important basic question.

Mr. Dickinson: It is pretty basic.

353 The Court: Yes.

Reply Argument of Mr. Willard H. McEwen on Behalf of Defendants

Mr. McEwen: If the Court please, the style of argument that has been adopted by plaintiff's counsel in this matter, renders it necessary that we go back and inquire into the fundamental principles upon which the defendants' case is built, and discuss those briefly, for I believe that there has been throughout the hearing a basic misconception of the defendants' arguments on the part of plaintiff's counsel.

We have been accused of many things, and if I felt—if I had the legal theories and had expressed them in this Court—all of those of which I have been accused, I think I would be a little ashamed of myself, but the questions involved in the defendants argument which we have attempted to impress upon the Court are not the bolshevist ideas of which plaintiff has accused us.

In the first place, it is our desire that the legal rights of carriers should receive no legal protection at the hands of the courts or otherwise; I think your Honor should realize the exact situation which is involved in the protection of contract rights and in the enforcement of contracts entered into between carriers and employees. The negotia-
354 tions as I pointed out to your Honor, yesterday, are joint.

Now, under a system where there is no central tribunal to decide a dispute, the administration of the contract is not joint, but it is a single administration vested primarily in the employer. It is the employer, in the first instance who says this is the way the contract shall be interpreted; this is the way the contract shall be applied, "for it is the carrier which inevitably and necessarily, under the conditions of the past, makes the application of the contract.

The carriers' legal rights under a contract, therefore, cannot be infringed upon unless the carrier itself is forced to adopt the policy of application of its agreements contrary to that which it has itself established and, if force is directed against it, you change this application, it has been found to be a wrongful force.

Now, applying that situation to the present case, what do we find? The Washington Terminal Company has an agreement which its able counsel says it has applied since 1923.

Mr. Dickinson: Since 1908.

Mr. McEwen: The actual agreement between the Brotherhoods and the carriers dates from 1923; prior to that the documents were referred to as agreements.

355 I believe also, Mr. Dickinson, that we made a little agreement, did we not, with regard to the matter of interruptions which I have kept throughout your long and very brilliant argument.

Mr. Dickinson: Yes.

Mr. McEwen: The employer has placed that agreement in effect; it is now in effect; the employer—the only damage that it claims is possible to it is the piling up of claims which it asserts have begun to develop since a certain award was made by the Adjustment Board.

Now, it is conceded that under the Railway Labor Act, your Honor, the employees have the sole right to come into Court and seek judicial enforcement of that award; they have the sole right to seek an order of the Court which will have the effect of coercing the carrier into changing its present operating practices but that right, your Honor, is limited to a period of two years; if it is not exercised within that period of two years, it is lost.

The carriers' protection of its legal rights depends solely on its waiting on the two year period and if, at the end of that time, no action is enforced against it, its operating practices may be continued without regard to the award of the Adjustment Board.

356 So that the terrible blow which is being dealt to the legal protection of plaintiff's agreement according to its argument, is after all not such a serious blow.

Now, in my opinion, it has been persistently argued by plaintiff that the functions of the Adjustment Board, according to our position, is not to interpret contracts, but to make new ones. This principle; this conclusion from certain language contained in our brief which was directed, of course, if the Court please, as the Court will see on further examination into the question of whether or not a power vested in the Adjustment Board is a judicial power or an administrative power—an issue, incidentally, your Honor, which is no longer before the courts, for the defendants, in the first instance, raised the question of the constitutionality of the Railway Labor Act as a vesting of judicial power in a non-judicial body—a question which is not now

presented to the Court in argument and is not presented in the plaintiff's brief, but it was the contention of the defendants that it was the purpose of the Adjustment Board and the purpose of the statute in establishing this Board, to provide for something more than the present interpretation of agreements; that is inherent, of course, in the Board's authority and in its jurisdiction; that is its function.
357 I should say that is its narrower function, but that function must be correlated to its larger purpose of securing industrial peace on the railroads—a function to which the Board cannot be blind.

Now, our argument amounts to this; that the Board in examining the contracts which were brought before it; in examining the interpretations which the carriers themselves had put upon those contracts, and in determining whether or not those interpretations were correct, the Board may legitimately give consideration to the basis purposes of the Act and the administrative purposes for which it was established—that is the preservation of industrial peace.

Now, that is not different materially from the same situation in regard to the Interstate Commerce Commission and its reparations orders.

The Interstate Commerce Commission was given juristion to decide reparations and claims, which are essential judicial matters in so far as their determination is concerned; it determines whether or not a certain carrier has violated the rules of law, but jurisdiction was vested in the Commission for the reason that it was desirable that the Commission might inquire as to the practices of uniformity throughout the country, and might accord that uni-
358 formity of rate for the purpose for which it was primarily instituted and, by analogy, it presented the argument that the functions of the Adjustment Board were administrative functions because it had, and it necessarily had and was intended to have in the back of its mind this administrative purpose.

We have not contended and we do not now contend that it is the power of this Board or that it is its function to simply disregard agreements made by the parties and to throw them aside and to formulate new agreements in their place.

We do not intimate in any sense that such is the function of the Board.

Now, I said that the plaintiff insists that that is exactly what the Board has done in this case, but as your Honor well knows, it is customary for any litigant coming into Court with that interpretation placed upon an agreement by a tribunal passing upon the matter previously, to come into Court and say, "here, the tribunal whose decision we are attempting to have reviewed has read into this agreement something which is not there, and has created a new contract for the parties," which is equivalent to saying that the lower tribunal has committed an error of law, and that is exactly the proposition that is being advanced
359 here as far as the plaintiff's individual case is concerned; it asserts that an error of law has been committed by the Adjustment Board and that it has read into the contract something that was not properly there, and that is far as the argument properly goes.

Now, it is contended by plaintiff that this is not a proceeding for review. The basis for that argument is this: that the plaintiff's proceeding is on its contract; that it seeks an interpretation of its contract rights.

Reduced to its lowest elements, that argument simply means, if it is true, that no proceeding is the proceeding for review, in the ordinary sense, and an interpretation of its substantive rights. That is obviously fallacious.

Any proceeding for review that does not involve merely procedural issues is based fundamentally on the contention of the plaintiff that his substantive rights have been violated.

Now, he has gone to one tribunal; that tribunal says, "You are wrong;" he appeals his case to a second tribunal, but presents the same case—argument and contentions he is still basing his case on the contract, but that proceeding is appealed; that proceeding is for review. The proceeding is determined to be one for review, or a proceeding
360 de novo, not because of the rights which are asserted in the proceeding, because they might be the same, but because of the effect which the review proceedings is destined to have upon the decision of the tribunal; that is, the tribunal passing on the case. I call your Honor's attention to pages 12 and 13 of the complaint, where it says:

"Praying relief of this Court and further declaring that said award No. 3115, Docket No. 5059 and Order of the National Railroad Adjustment Board, First Division, entered therein, did not lawfully confer any right upon the defendants to perform the work of making such movements, and that said award and order insofar as they purport to confer any such right are invalid and of no legal force and effect."

Mr. Dickinson: If the Court please, as is sometimes the case when a pleading is prepared, the case is not as fully stated as it might be afterwards, as far as we are concerned, we do not regard such particular part of the prayer as of any importance, and are perfectly willing to strike here now. We attach no importance to it whatever and do not regard it as a part of our case.

Mr. McEwen: Suppose we leave out of consideration the language which plaintiff's earlier conception of the case inserted in the pleadings, is there any question that
361 this is exactly the effect, whether the plaintiff says it or not, this is exactly the effect which this proceeding is designed to have, in other words, let us examine it for just a moment, in as much as plaintiff, apparently, desires to abandon it—"that the order of the Board entered therein did not lawfully confer any right upon the defendants to perform the work of making such movements."

All right; suppose that is out of the complaint entirely; then, is it the position of the petitioner that they desire no declaration as to the award, and is the award to stand regardless of this action as conferring rights upon the defendants to "perform the work of making such movements," and is the award and order to stand so far as the - - -

Mr. Dickinson: (Interposing) I do not mean to interrupt.

Mr. McEwen: Pardon, me, until I finish my sentence. I believe you have already occupied more than your allotted period of time.

Mr. Dickinson: It was my understanding that you made the claim in your brief that the award does not confer any rights, and that seems to be inconsistent with the argument you are making now, and I don't understand it.

Mr. McEwen: May it please the Court, if I may continue—is the position of the plaintiff, then, that this

362 paragraph is to be taken out of their complaint; that the award and order are to be effective to confer such rights; is the order and award valid, or is it of some legal force and effect?

What, exactly, is the contention of the plaintiff as to this award? When this proceeding is over with, your Honor, what will happen to that award? Will it be effective, or where will it be, or what will be its legal standing?

May the defendants still come into Court under section 3 (p) of the Railway Labor Act and institute a proceeding to enforce it? Is it still valid in such a proceeding as to have these findings of fact given prima facie effect by a review in Court? Is it still effective to give the defendants a right to attorney's fees, court costs, and various and other sundry rights given them under section 3 (p)?

If this proceeding has any effect at all, this proceeding in which we are now engaged, the necessary and absolute legal effect must be to invalidate and wipe out the award of the Board, and if that is its purpose, whether stated in the complaint or not, if that is its purpose, then it must necessarily be a proceeding for review.

Plaintiff has advanced still further pronouncements to this effect: that proceedings under section 3 (p) are

363 not proceedings for review - - -

Mr. Dickinson: (Interposting) That is not what I said.

Mr. McEwen: Please, Mr. Dickinson—but are merely proceedings designed to interpret the contract. If so, the language of the statute is peculiarly phrased, for the section in question concludes as follows:

"The District Courts are empowered, under the rules of the Court governing actions of law, to make such order and enter such judgment, by writ of mandamus or otherwise as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Now, in this connection, a large portion of plaintiff argument was based upon quotations taken from the defendant's memorandum filed with your Honor.

I assume, of course, that in the examination of that memorandum, those isolated sentences and phrases which have been quoted here in oral argument, will naturally take their normal places in the course of development of the argu-

ment, and will assume the significance that we intended to give them in view of the facts, but I do wish to call your Honor's attention to one particularly glaring example of bold misinterpretation of the defendants argument.

These sentences are read from page 9 of our
364 brief:

"In other words, the procedure established by the Act, is not a procedure for review."

Mr. Dickinson: I agree I misread that.

Mr. McEwen: It is on that page, and, obviously, it refers to the Declaratory Judgments Act, and not to the Railway Labor Act.

Mr. Dickinson: I agree I misread that.

The Court: What have you to say in a case where the decision of the Adjustment Board is in favor of the plaintiff's railroad and against the employees? How is the plaintiff's railroad going to enforce that award of the Adjustment Board against the employees?

Mr. McEwen: The plaintiff railroad will enforce the award in the same way that it encorced the original contract, for the award has simply said that the employees have no claim.

Now, prior to the award, the railroad applied the agreement to suit itself, according to its own interpretation; subsequently to the award it will continue to do the same; if the employees don't like it, the only recourse that they might have would be to leave their employment.

The Court: But you do not contend that they have
365 no right to come into Court?

Mr. McEwen: No, sir.

The Court: For a declaratory judgment injunction?

Mr. McEwen: It has. The only case that is applicable to that situation, your Honor, is one I have—I believe I can find it if you will grant me just a moment.

The Court: Yes.

Mr. McEwen: It is cited on page 42 of our original brief —in a case where the Court held that a shipper invoking the jurisdiction of the Interstate Commerce Commission to pass upon his reparations claims is finally considered by an adverse action of the Commission and cannot thereafter resort to the Courts; we have already called to the Court's attention the fact that the provisions for the enforcement

and review of the orders of the Adjustment Board are the same as provided for reparation orders for the Interstate Commerce Commission, and I believe that is sound because, after all, in going to the Adjustment Board the employees are invoking the administrative process set up by statute; 99.1 per cent—it may be 100 per cent—of those cases—are presented to the Adjustment Board by the employees.

Mr. Dickinson: We don't take cases there.

366 Mr. McEwen: The reason, of course, why the employer does not take cases there is because the employer has no reason to seek the protection of the Board for the application of contract rights, as it interprets them, because it is already applying them according to its interpretation.

The Court: But it is a matter of law and of right under the statute—an employer may seek the protection of the Board?

Mr. McEwen: Oh, yes.

The Court: I supposed they did. When that question comes up and the decision is in favor of the employer railroad and against the employee, what right has the employer railroad to enforce the award that is made?

Mr. McEwen: I see your Honor's question. We will assume, in the first place, that the carrier presents a case to the Board.

The Court: They both submit it.

Mr. McEwen: They do, to this extent—

The Court: (Interposing) Do you think it makes this right any less if it is presented initially by the railroad?

Mr. McEwen: No. A petitioner before the Board is given the right to enforce the action of the Board; if the

367 carrier is the petitioner, I see no reason why the carrier would not have a right under section 3 (p) to file an action for enforcement if the award is made for the carrier's benefit. I see no reason why it may not do so under those circumstances.

The Court: I don't think it is under section 3 (p).

Mr. McEwen: I think so, your Honor.

The Court: It says, "if the carrier does not comply with the law".

Mr. McEwen: That is right, perhaps I misread that.

The Court: That is all right.

Mr. McEwen: I had not given that consideration.

The Court: I want to get back again to the question of what may be done or what can be done where an award has been made in favor of the railroad, whether the railroad applied to the Adjustment Board or whether the employee, in the first instance, filed it—it makes no difference—but the decision and the award is in favor of the railroad; in other words, in this case, suppose the decision had been that the engineers and firemen who had carried the trains over the road had the right to shift those cars in and around the yards, and the employees there—the local firemen and engineers, or whatever you call them started doing the work—what is the situation?

368 Mr. McEwen: I suppose the answer to that is, your Honor, that if they don't like it they can quit. The operating practices are in charge of the employer; if the employees fail to operate according to the practices of the employer which have been established, and in violation of the award of the Board, they are subject to discharge.

The Court: Then, in other words, that gives the carrier his complete remedy, because he can just do what the award in his favor requires him to do, and the employees may continue in the employment or not as they see fit?

Mr. McEwen: Yes.

The Court: So that your contention is that that gives the carrier a complete remedy when the award is in his favor?

Mr. McEwen: Yes, sir.

The Court: Whereas, when the award is in favor of the employee, unless you have this section 3 (p), you claim that the employee would have no sufficient remedy?

Mr. McEwen: That is correct.

The Court: To enforce the award against the carrier?

Mr. McEwen: Yes, sir.

369 The Court: Now, that seems to be cleared up in regard to both sides. What about this Act being compulsory or not?

Mr. McEwen: You mean the question—

The Court: (Interposing) As regards filing a submission?

Mr. McEwen: Well, that is a question, your Honor, to which we have given particular attention in view of the argument in this case; unless the question here is a matter

of jurisdiction of the Court under the Declaratory Judgments Act,—but if your Honor wishes, I will endeavor to give my tentative ideas on it as accurately as I can.

The Court: That might possibly be involved in this question of the rights of the parties under the contractual relationship, and any views under their contractual relationship or power or jurisdiction that is given to this Board—and then the question of the rights of the public in contracts and relationships between public carriers and their employees. Now, what is your idea in regard to the compulsion or lack of compulsion in this proceeding for an adjustment?

Mr. McEwen: I think I understand your Honor's question. In the first place, neither party is compelled to resort to that procedure, that much is clear.

The Court: By agreement of both parties?

370 Mr. Prince: I would like to call your Honor's attention to the sharp distinction drawn in the rules, at page 20, about voluntary submission where the parties join in submitting the proceeding and an ex parte submission where the carrier refuses to come in and is summoned by the Court. This case is such a case as that.

The Court: I understand this case and, in this case, the employees filed a submission, as they call it.

Mr. McEwen: Yes.

The Court: And then the employer was free to ignore it, or could he be compelled by the Board, anyway, to come in?

Mr. Dickinson: A decision could have been made; the award could have been made by default.

The Court: I know; I say they could ignore it and let it go by default; even so, the defendants would insist upon the plaintiff making out his case, so your idea is that, aside from voluntary submission by the two parties, either party may voluntarily go in and file a submission, and that then the other party is required to file a submission or the employee would get a pro confesso judgment by default—is that right?

Mr. McEwen: I don't know that that would be

371 necessarily a decree by default.

The Court: I don't mean by default, I mean the substance of it.

Mr. McEwen: In general, I think that is correct.

The Court: All right, So even where there is notice to the parties, either party may go in, and, in that way, in effect, force the other party in—is that it?

Mr. McEwen: I think so.

The Court: So while you might say there is no compulsion, really there is; that is, this Board has been set up and either party can apply to it and the other party must come in.

Mr. McEwen: There is a case that is analagous to this; a case I had occasion to check—the decision—the name of the case has escaped me but, of course, its citation is there; it was a case in the Supreme Court of the United States dealing with arbitration proceedings provided for by the State law of the State of Massachusetts—I believe I am correct in that regard—in connection with claims of insured individuals under fire insurance policies.

There is a provision requiring the parties to agree as a prerequisite to their doing business in the State of Massa-
372 chusetts, that they would submit the amount of loss to a Board of arbitrators selected by the parties themselves, and the question arose there as to the constitutionality of the Act, as to whether or not an Act was constitutional—I could secure the quotation if your Honor is interested in going further into the character of that kind of policy.

Mr. Dickinson: The Union Insurance Company did not have to go into Massachusetts to do business if it did not want to.

Mr. McEwen: That is right. I also call your Honor's attention to the section in the Act—if you will excuse me just a minute—here we are: Section 2, paragraph eighth: "Every carrier shall notify its employees by printed notice in such form and posted at such times and places as shall be specified by the Mediation Board, and that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and any such notices thereof shall be printed verbatim in large type"—the rest of it is not material.

I don't know whether this carrier posted such a notice or not; I presume it did, if it did so, using Mr. Dickinson's argument as a prerequisite to its functioning in the legal

conduct of business, and having done so, having agreed to settle the disputes as provided by this Act, it would
373 necessarily be bound—that would be my interpretation of that provision.

Mr. Dickinson: You mean compulsory arbitration?

Mr. McEwen: "Them are harsh words, Mr. Dickinson."

Mr. Dickinson: I know they are. You don't mean to imply that the employees cannot strike against an award of the Board?

Mr. McEwen: Of course, whether the employees might or might not strike, the question is, would such a strike be legal?—Would it not? They can strike, of course, or an employee can quit his work at any time that he sees fit whether or not such a strike might be called.

Mr. Dickinson: You mean there would be no protection—there would be no protection of any kind to—

Mr. McEwen: (Interposing) How do you mean?

Mr. Dickinson: (Continuing) To the employees if they went on strike; they could not picket; could not do any of those things?

Mr. McEwen: I say, that would be subject to whether or not they have violated any rule of law; if so, the carrier would of course have its opportunity to come in to a Court of Equity and set up those violations if they existed; it would be subject, then, to establishing the facts of
374 the case.

The Court: I think we had better keep down to the record because we have enough trouble as it is, when we get to preparing judgment to consider such possible constructions; it is putting too much of a burden on the Court.

Mr. Dickinson: This is a beautiful example of an attempt to have one's cake and eat it too.

Mr. McEwen: Not at all. I feel that we have already sufficiently imposed upon your Honor's time in listening to us, and I certainly thank you for the careful attention you have given.

Mr. Dickinson: There is just one thought I would like to leave in the mind of the Court and that is, as I said at the beginning, so I say at the end: with all this talk about judicial tribunals, and quasi-judicial tribunals, and arbitrary tribunals, we must remember what kind of a board we are

dealing with in the case of this Adjustment Board and that, however and whenever powers have been conferred upon government officials to interfere with the rights of the parties, and to compel them to do things that the contracts do not provide for, and compel them to do something else, we are getting a great deal further when we confer that power upon a Board like this Board, with no hearings of any substantial kind, which makes no findings of any substantial nature, which proceeds in this extremely ar-
375 bitrary and summary and drumhead criminal manner.

Mr. Prince: I might answer one question that was asked; it will only take a minute. On page 43 is exhibit F of the complaint; that contains the entire submissions that were before this Board; it is on pages 43, 44, 45, 46 and 47 of the complaint.

If your Honor will turn to those pages you will see what was before this Board and you will readily see that no arbitration proceeding was submitted to those gentlemen to consider in Chicago; they did not consider whether or not it would be economical to put two engines on to handle this train instead of one, or whether or not it would be possible for that number of engines to work at the same time through the interlocking devices—none of those things was considered. Your Honor can see exactly what was submitted to this Board.

Mr. Dickinson: In other words, the question of public interest was not submited at all; it was a technical question as between the parties. The public and the public interest must be reckoned with.

Mr. McEwen: We surely don't have to submit it.

The Court: I will take the case under advisement.

376 (Whereupon, at 12:10 o'clock p. m. of the same day, May 16, 1939, hearing in the above-entitled matter on the motion to dismiss was concluded.)

377 *Order Dismissing Complaint.*

Filed June 5 1939

* * *

Upon consideration of the Complaint filed herein, the answer of defendants as set forth in the first and second defenses, the briefs filed by the respective parties, and the Court considering said first and second defenses in the nature of a motion to dismiss, and the matter having been argued in open Court by counsel for the respective parties, it is, by the Court, this 5th day of June, 1939:

Ordered and Adjudged, that defendant's first and second defenses be, and the same are hereby sustained, and said complaint be, and the same is hereby dismissed, with costs against the plaintiff.

DANIEL W. O'DONOGHUE
Justice.

Notice of Appeal

Filed June 6 1939

* * *

Notice is hereby given this 6th day of June 1939, that The Washington Terminal Company, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of June, 1939, in favor of defendants-appellees, F. E. Boswell, et al, against said Washington Terminal Company.

SYDNEY R. PRINCE JR.
Attorney for The Washington Terminal Company, Plaintiff-Appellant.

Memorandum

June 6 1939

Cost bond ($250) on appeal—filed.

Date			Proceedings	
1938	Dec.	29	Deposit for costs by—Prince:	
"	"	"	Complaint and Exhs (6)	filed
"	"	30	Summons & Copies (54) Complaint issued	
1939	Jan.	24	Summons ret'd "Served as to certain defts & not fd as to others" (See file)	
"	"	26	Stipulation extending time to plead to 2/15/39, appearance Willis for defts.	
"	"	31	Sum. & copy issued as to deft. No. 22—Served 2/7/39	
"	Feb.	15	Ans. of defts. to compt	filed
"	"	21	Mo. of plff. to call up defenses for hearing. Notice, P. & A.	
"	Mar.	2	Order for preliminary hearing of defenses, Bailey, J. (consent)	
"	"	20	Memo Brief of Defendants.	filed
"	"	24	Stipulation	
"	Apr.	11	P. & A. of plff. in opp. to memo. of defts.	
"	May	11	P. & A. of deft. in opp. to P. & A. of plff.	
"	"	24	Transcript of argument of 1st & 2d defenses before Court	
"	"	"	Oral decision of O'Donoghue, J. for defts on 1st & 2nd defenses.	
"	June	5	Order dismissing complaint, O'Donoghue, J. (Notices 2 mailed).	
"	"	6	Notice of Appeal—Copy mailed William E. Willis	filed
"	"	"	Clerks costs on appeal by Prince	
"	"	"	Cost bond ($250) on appeal with American Surety Company of N Y as surety	filed
"	"	10	Designation of Record	"
"	"	"	Transcript of Argument (Volumes 1 & 2)	filed
"	"	"	Stipulation in re-transcript of Record	filed

379 *Designation of Record*

Filed June 10 1939

* * *

Now comes the plaintiff Washington Terminal Company, appellant, and designates for inclusion in the transcript the complete record and proceedings and evidence in the action, namely:

1. Bill of complaint with exhibits
2. Answer of defendants consisting of First, Second, and Third Defenses
3. Order assigning First and Second Defenses for advance hearing
4. "Memorandum Brief of Defendants", filed circa March 20, 1939
5. Brief entitled, "Plaintiff's Memorandum of Points and Authorities
6. Brief entitled, "Defendants' Memorandum of Points and Authorities, etc", filed circa May 10, 1939
7. Transcript of argument of May 15th and 16th, filed May 24, 1939
8. Order Dismissing Complaint, dated June 5, 1939
9. Docket entries
10. Notice of Appeal, filed June 6, 1939
11. This designation

JOHN DICKINSON
SYDNEY R. PRINCE JR.
Attorneys for The Washington Terminal Company.

We concur in the foregoing designation of record this 9th day of June, 1939, on defendants' behalf

FRANK L. MULHOLLAND
WILLIAM E. WILLIS
Attorneys for Defendants.

380 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify

the foregoing pages numbered from 1 to 379, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 1165, Civil Action, wherein The Washington Terminal Company is Plaintiff and F. E. Boswell, et al., are defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of June, 1939.

C. E. STEWART,

(Seal) *Clerk.*

Endorsed on cover: No. 7465. The Washington Terminal Company, Appellant, vs. F. E. Boswell et al. United States Court of Appeals for the District of Columbia Filed Jul 8-1939 Joseph W. Stewart, Clerk.

[fol. 330] Thursday, April 18th, A. D. 1940.

No. 7465

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. B. BRIDGES, et al.

The Honorable John Dickinson of Philadelphia, Pennsylvania, member of the Bar of the Supreme Court of Pennsylvania and of the Bar of the United States Supreme Court, was introduced to the Court by Mr. Henry L. Walker and the Court recognized him for the purposes of this case.

The argument in the above entitled cause was commenced by Mr. John Dickinson, attorney for appellant, continued by Mr. Frank L. Mulholland, attorney for appellees, and concluded by Mr. John Dickinson, attorney for appellant.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7465

THE WASHINGTON TERMINAL COMPANY, APPELLANT,

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Decided November 18, 1941

Mr. John Dickinson, with whom *Messrs. Sydney R. Prince, Jr.*, and *Henry L. Walker* were on the brief, for appellants.

Mr. Frank L. Mulholland, with whom *Messrs. Willard H. McEwen* and *William E. Willis* were on the brief, for appellees.

Before STEPHENS, MILLER and RUTLEDGE, JJ.

RUTLEDGE, J. The Declaratory Judgments Act, 48 Stat. 955, was enacted June 14, 1934.[1] One week later the Railway Labor Act (Act of June 21, 1934, 48 Stat. 1185) was passed. The latter established the National Railway Adjustment Board for settlement of disputes arising under collective agreements between the carriers and their employees. The Board's awards are not enforceable by it. But awards in favor of employees may be enforced by suit in the District Courts begun within two years from accrual of the causes of action under them. 45 U. S. C. § 153 First (p), (q).

In such a suit the Act gives the employee definite and substantial advantages. [*Id.* (p)] It does not expressly make the enforcement suit exclusive of others to determine rights arising under collective agreements. The question in this case is whether it has done so impliedly, as to a carrier and employees who have utilized the adjustment procedure and procured an award. Stated otherwise, the issue is whether a carrier, which has been unsuccessful before the Board, can maintain a suit for a declaratory judgment of rights under the original collective agreement during the two years which the Act allows for the employees' enforcement suit. We think the answer should be negative, and therefore the District Court was right in dismissing the complaint of the carrier, appellant here.

The decision in *Moore* v. *Illinois Central R. R.*, 312 U. S. 630 (1941), rendered since this case was argued, has put beside the point much of the argument here. The case held that the Railway Labor Act does not preclude an employee from bringing a suit for damages for alleged wrongful discharge contrary to a collective agreement. The plaintiff employee, however, had begun his suit before the administrative machinery had been set in motion. The decision establishes

[1] The Act was amended by Act of August 30, 1935, 49 STAT. 1027.

that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms.

But the *Moore* case neither presented nor decided the question whether, when one party has put the adjustment procedure in operation, the other may disregard it entirely and at any subsequent stage have a judicial determination of the issues other than that provided by the Act. From the fact that either party may go directly into court in the beginning for relief independent of the statute, it does not follow that he or the other may short-circuit the administrative proceeding while it is in progress or the statutory enforcement suit during the two years allowed for bringing it.[2] That is true, whether the matter be regarded as involving the existence of jurisdiction in the courts independently of the Act or merely sound judicial discretion in its exercise.

In this case the dispute arose under a collective agreement made February 1, 1923, between the plaintiff carrier and two labor unions,[3] which represented the employees who are the defendants. The agreement fixed seniority rights and other terms of employment of enginemen and firemen. In 1934 defendants asserted they were entitled under the agreement to perform certain work which others previously had done. This consisted chiefly in moving empty passenger cars from the storage yard to the Union Terminal Passenger Station in Washington, D. C., and *vice versa*, preceding and following, respectively, the departure and arrival of trains on interstation runs. The regular train crews had done and still do this work. They are employees of the railroads—called the tenant lines—which use the station's terminal facilities.

Plaintiff rejected defendants' claim. Thereafter they invited it to make a joint submission of the dispute to the Board. Plaintiff declined. But, as the Act entitled them to do,[4] defendants submitted it. Plaintiff thereupon apeared in the proceedings and made full submission on the merits in accordance with the statutory provisions.[5]

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[2] The facts do not require us to be concerned with the question whether suit independent of the statute could be instituted by either party after the expiration of the two-year period. But *cf. infra* this opinion.

[3] The Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen.

[4] Section 3 First (i) [45 U. S. C. § 153 First (i)] requires private negotiation up to the carrier's chief operating officer for handling disputes, and provides: "but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board...."

[5] Although plaintiff declined to make a joint submission, when defendants submitted the dispute plaintiff made no objection to the Board's jurisdiction but appeared and participated in the proceedings throughout without questioning the Board's power to make an award. It need not be decided whether plaintiff might have refrained from appearing or participating. It elected to do so, and thus had the full benefit of the proceeding. If the proceeding had been a suit in court, the appearance would have been a general one.

The Board, acting by its First Division, deadlocked. A referee was appointed as the Act requires in such an event and, with his participation, the Board's award was made October 24, 1938. It held that the contract entitled the employees to perform the work in question. The same day the Board ordered the employer to make the award effective within thirty days. Plaintiff has not complied. Instead, on December 29, 1938, it filed this suit. It was begun, therefore, slightly more than one month from the day on which the employees' cause of action arose on the award, although the Act gave them two years to sue upon it and made no provision for an employer's suit to set it aside or restrain its enforcement.[6]

I.

The suit asks for an adjudication of rights under the original contract. It seeks also a declaration that the Board's award and order are void. Whether or not the issues in suit and those of the administrative proceeding are identical in all respects,[7] they are so to the extent that each involves the question whether the collective agreement, rightly interpreted, gives the employee defendants the right to do the work in dispute. That is the fundamental issue presented in both. The effect, therefore, of a declaratory judgment favorable to plaintiff would be to nullify the award. Consequently this suit is essentially one to review it. Whether the judgment were in plaintiff's favor or otherwise, allowing the suit to be maintained would deprive the employees of the special advantages which the Act confers upon them in the enforcement suit.

We do not think that Congress intended the Board's awards to be reviewable in this manner. The Railway Labor Act makes no provision for review as such. But it does set forth a definite and special scheme for securing judicial determination that the award is or is not in accordance with the legal rights of the parties. If the scheme is adequate constitutionally, as we think it is, we do not believe Congress intended that it should be circumvented by free resort to other forms of judicial review or determination *de novo* of the merits of the controversy.

If Congress had made no provision for judicial review, in the broad sense we have indicated, the general applicability of the Declaratory Judgments Act, adopted almost simultaneously, might be regarded as supplying the omission. But the matter was not an omitted one. This is shown conclusively by the presence in the Railway Labor Act of the detailed plan for review. It is shown further by the character of the plan's details. We think these things show, too, that the method of review provided was intended to be exclusive. If Congress had intended the Declaratory Judgments Act to be generally

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[6] The facts have been stated only in essential outline. A more detailed statement appears in the able dissenting opinion, to which reference is made in the interest of economy of space.

[7] Under Section 3 First (p) [45 U. S. C. § 153 First (p)] the employee's petition in the enforcement suit must set forth "the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises." He is not limited to matters stated in the award, nor is the carrier in its defenses. But those matters necessarily are in issue, and generally they are the only ones when the dispute, the administrative proceeding and the award involve interpretation and application of agreement. The suit is *de novo*, not merely one for review proper.

available to the parties, regardless of the fact that an award had been made and of its terms, there could have been no substantial reason for including in the Railway Labor Act the complex and detailed provisions for the enforcement suit or, for that matter, any special method of review. More especially, there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employee seeking enforcement.

Congress intended these advantages to mean something. They mean nothing if such a suit as this can be maintained. They are very substantial advantages. They are conferred by Section 3 First (p) of the Act [45 U. S. C. § 153 First (p)], which is set out in full below.[8] Their purpose and effect, as will be seen, is to equalize the burden, financial and otherwise, of extended litigation as between employees and the carriers. The Act contemplates suits by individual employees as well as by labor unions. It recognizes the unequal financial position of the litigants when a railway laborer pits his strength against his employer's in court. Whatever may be true of unions, individual employees do not maintain corporate legal departments, sustained by revenues derived from the public. They cannot charge off attorneys' fees to business expense. Often their own resources would be inadequate to secure competent counsel. The relief sought often does not include recovery of money, so that a contingent fee payable only from the proceeds of recovery or the employee's resources frequently would not be attractive. Congress recognized this inequality and undertook to reduce it. Hence, the Act provides for recovery of an attorney's fee, if the employee is successful in the suit. [45 U. S. C. § 153 First (p)] Costs of litigation alone are prohibitive, particularly to laboring people suing as individuals. Hence the petitioner in an enforcement suit is exempted from their payment, except those that accrue upon his appeal. Situs of litigation may be highly important, also as a matter of expense, to the complaining employee. Hence he may sue where he resides or where the carrier's principal operating office is located. Choice of venue in litigation which is unequal because of the financial advantage of the other party may mean the difference between asserting one's rights in court and foregoing them altogether. All these advantages, choice of venue, exemption from payment of costs, and recovery of attorney's fees if successful, are intended to

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[8] "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, or as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

make less unequal than in ordinary or general litigation the contest between employee and carrier over work and the terms on which it is done. The latter is equipped for litigation, to the last resort. The former is not. In equalizing the struggle somewhat, Congress has recognized that justice too often is blind to financial inequality between the parties in litigation, especially when they are employer and employee, and has determined that it shall not be entirely so in these disputes.

The statute also relieves the employee of another burden. It provides that the enforcement suit "shall proceed in all respects as other civil suits, except that on the trial . . . the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated." [45 U. S. C. § 153 First (p)] The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike.[9] That does not make their findings and decisions less probative; rather it should make them more so. They know the language,[10] functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony.

All these advantages the statute makes incident to the enforcement suit. They cannot be had in any other. We have no power to grant them in this one. Yet the argument that it can be maintained brushes them aside, as if they were mere matters of procedure, not affecting the substance of decision or right. With that we cannot agree. In many cases their absence would mean the denial of decision and of right. In others the burden of securing these would be increased. When Congress created the advantages, we think it intended they should be available in all suits essentially for review of the Board's awards, at any rate during the two years allowed for bring-

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[9] As will be shown, *infra*, the Act appears designed to reduce resort to the courts for determination of these controversies to a minimum, consistent with adequate constitutional protection for the rights of the disputants.

[10] An instance of railroad vocabulary is cited in Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937), 46 YALE L. J. 567, 569, note 10: "The following bulletin was issued by a superintendent of the Southern Pacific Ry. in San Jose, Cal., on Dec. 20, 1928: 'All Yardmasters: Effective date, all yardmen in cannon-ball service bringing drags in yard from outside points will bleed and cut own cars.'"

ing enforcement suits. We do not believe it meant to set up a race of diligence between employer and employees to see which could beat the other into court after an award is made. The terms of the Act, particularly Section 3 First (p), clearly negative such an idea. Yet that will be the inevitable result of allowing other than enforcement suits during the period of limitations. Congress had no purpose to give the statutory advantages to the employee if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award. If a carrier can have full advantage of the administrative proceeding,[11] on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. The Board's awards would amount to nothing more than innocuous advice to the disputants, like that provided for under the Railway Labor Act of 1920 [41 Stat. 470 (1920), 45 U. S. C. § 144 (1934)], or mere proposals for a new agreement, having not even the force of an offer in the law of contracts. If that is the result of the Act and of an award, Congress went to much ado about nothing. The chief effect of the legislation would be to create much complicated machinery, capable of producing only delay and confusion in settlement of disputes which it was the avowed object of the Act to end with expeditious decision. We do not believe that Congress intended any such consequences.

As against these views, the extreme argument is made that Congress did intend the Act to provide nothing more, prior to institution of suit to enforce an award, than an elaborate and complicated method of private, voluntary negotiation. In this conception the Board becomes a mere private go-between, without arbitral or quasi-judicial powers, not a public institution. The argument ignores the language, purposes and effects of the statute, both in its administrative provisions and in those for judicial enforcement of awards. It disregards, too, the basic, progressive, and integral structure of the statute.

The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement.[12] While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision. The first

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[11] According to statistics available in 1938, approximately one-third of the Board's awards were in favor of the carrier. Of a total of 3,134 decisions rendered, petitions were sustained in 1,745 cases, denied in 888, sustained in part in 394, and dismissed or remanded in 107. SPENCER, THE NATIONAL RAILROAD ADJUSTMENT BOARD (1938) 50. Since the Act makes no provision for suit by the employee to set aside or review unfavorable awards, it is at least doubtful whether such a remedy exists. *Cf. infra* this opinion. If none exists, the carrier has the advantage, when successful before the Board, of a conclusive determination. If, on the contrary, the employee may have review independently of the statute, it would be without benefit of the statutory advantages.

[12] The negotiating phase is covered by Sections 2 (First to Tenth), 3 First (i) [48 STAT. 1186, 1191, 45 U. S. C. §§ 152, 153 First (i) (1934)]; that of administrative determination by Sections 3 First (a-o) [48 STAT. 1189-92, 45 U. S. C. §§ 153 First (a-o) (1934)]; and that of judicial enforcement by Sections 3 First (p), (q) [48 STAT. 1192, 45 U. S. C. §§ 153 First (p), (q) (1934)].

stage is private and voluntary. The second is voluntary, though in our view not private. The third is public and we think exclusive, though not compulsory.[13] Despite these differences, each stage has special relation to and effects upon the other.

The language of the Act regarding the second phase is not that of private negotiation. Section 3 establishes the Adjustment Board and gives its first division "*jurisdiction* over disputes involving train and yard-service employees." [45 U. S. C. § 153 First (h)] The dispute is referred to the Board, after unsuccessful private negotiation, "by *petition* of the parties or *by either party.*" [*Id.* (i)] Awards must be stated in writing and "shall be *final and binding* upon both parties" except as to money awards.[14] [*Id.* (m)] When the award favors the petitioner-employee, the Board must make "an *order*, directed to the carrier, to make the award effective." [*Id.* (o)] "Jurisdiction," "petition . . . by either party," "final and binding upon both parties," "an order, directed to the carrier," these are not words of polite suggestion. They are terms of duty, if not of force. They describe power and decision, not mere advisory intermediation. That is true though the Board has no power to enforce its orders otherwise than by decision. In that respect the awards and orders may be said to constitute a kind of administrative declaratory judgment. This view is consistent, too, as the other is not, with the Act's expressly declared objects, "to avoid interruption to commerce and to provide for *prompt* and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." [45 U. S. C. § 151a] (Italics in this paragraph supplied)

The enforcement provisions also show that the administrative phase is not merely advisory or simply "private negotiation." As has been shown, awards are given substantial legal effects in the enforcement phase. In addition to those mentioned previously awards favoring employees create causes of action in their favor. [45 U. S. C. § 153 First (q)] Mere private go-betweens have no such power, unless they are agents.[15] It is true that the award is not a conclusive legal determination. That is true also of any decision, administrative or judicial, which is reviewable or determinable *de novo* by the courts. But that does not mean that the decision has no legal effect or that it amounts to mere private advice. If we assume that Congress could attach to the advisory action of mere private intermediaries the consequences which it has given to awards favoring employees, their character is such as to make improbable its intention to do so. That it has done so indicates rather that it regarded the Board as a public agency per-

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[13] The Act permits, but does not require, the employee to bring an enforcement suit. Section 3 First (p).

[14] This provision is qualified by the absence of provision for enforcement by the Board and by the provision of Section 3 First (p) that the findings and order shall be prima facie evidence of the facts stated, in the enforcement suit. *Cf.* note 36 *infra*.

[15] The Board is bi-partisan [45 U. S. C. § 153 First (a)], as are its divisions [*Id.* (h)], and the members are paid by the parties who select them. But awards can be made only by a majority, and when the members deadlock a referee participates to break it. There is, of course, something of partisan representation, but it is not that of private agency. The Board and its divisions act in their official capacities when making awards. *Cf.* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 185, 186.

forming public functions. There would have been no point in resorting to Congress to establish the Board and define its jurisdiction and powers if it had been intended to be a merely private agency and its functions merely advisory. That could have been done by private arrangements. And experience with the 1920 Act demonstrated that such procedures were a failure.

The view that the Board is a public agency doing public work derives support also from the long legislative history of the Railway Labor Acts.[16]

But it is said the decision in *Moore* v. *Illinois Central R. R.*, *supra*, and language of the opinion, establish that Congress intended the Board to be a private agency and its awards to have private, advisory character. This conclusion is drawn because, according to the opinion, the Railway Labor Acts have not been "based upon a philosophy of compulsion," but were intended to create "a system for peaceful adjustment and mediation voluntary in its nature."[17]

The argument confuses private quality with voluntary character. It also ignores the always present limitation upon judicial language imposed by the facts concerning which it is used. It is one thing to hold that Congress intended an administrative remedy to be voluntary in nature, not based upon a philosophy of legal compulsion. It is another, and entirely different one, to hold that it intended the remedy to be legally ineffective when resorted to voluntarily by the disputants. Keeping open the usual channels of judicial relief before the administrative procedure has been set in motion is entirely consistent with and fully satisfies the statutory scheme's voluntary character and absence of compulsion. Choice has its play for or against it. But when choice has been exercised and the statutory methods have been employed, it does not follow, from the statute or the *Moore* case, that Congress intended their consequences, declared by itself, to be wholly ignored by the parties or the courts as they might be if they were mere private advice or suggestion. The *Moore* decision holds that Congress has not compelled disputants to go before the Board. It does not hold that, having gone, they can disregard the award and its consequences at will. That would be too much to imply from the decision or the Court's language. That language has full meaning when applied to the facts of that case. In our view it is perverted when fitted to the facts of this one.

We think, therefore, that Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice. It intended the employees, when successful before the Board, to have definite and substantial probative and financial advantages in suits to enforce awards, which they cannot have in other suits. Because this is so, and because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts during that period to keep hands off these controversies except in the manner specified in the Act. This would be true if it were necessary to regard the issue now presented as involving the existence of jurisdiction to enter-

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16 For this see SPENCER, THE NATIONAL RAILROAD ADJUSTMENT BOARD (1938); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937) 46 YALE L. J. 567.

17 312 U. S. at 635, 636.

tain other forms of suit. It is equally true, when the issue is considered as presenting a question of sound judicial discretion in declining to exert jurisdiction, more especially since this is a suit for a declaratory judgment. To permit maintenance of this suit would short-circuit both the administrative proceeding and the special statutory suit. It would make the Railway Labor Act a dead letter so far as legal effect is concerned, perhaps also as a "voluntary, private system of negotiation."[18] So far as the intention of Congress goes, therefore, we cannot believe these results were contemplated.

II.

It remains to consider the constitutional questions. They are closely related to those concerning Congress' intent. It is argued that the Act must be construed as creating merely a private, non-obligatory system of negotiation, because otherwise considered the administrative procedure is wanting in the essentials of due process of law and the remedy afforded the employer by defense to the employee's enforcement suit is inadequate. Thus it is said that to give the Act the effect of preventing the maintenance of the present suit will deny to the carrier constitutionally guaranteed protection of its rights.

Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality. Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights. The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit *de novo*.[19] In the suit the cause of action is upon the award, to secure its enforcement. But the parties are not limited by its provisions in the trial. The employee must set forth "the causes for which he claims relief" and the Board's order. [45 U. S. C. § 153 First (p)] The suit must "proceed in all respects as other civil suits," except that the order and findings "shall be prima facie evidence of the facts therein stated." (*Ibid.*) The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one. That is hardly disputed. The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial.[20] Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the en-

[18] It is doubtful whether parties would resort to a procedure which could be discarded at any moment without some adverse legal effect. In that event, the only certain result would be delay in the final settlement.

[19] Because of its prima facie factual effect, the award may give the suit something more than the character of a normal suit *de novo*. But the suit may be classified thus more accurately than as one for review proper.

[20] *Cf.* note 32 *infra*. See also the enforcement suit provisions of the Federal Trade Commission Act, Sections 9 and 10 (38 STAT. 723), held to provide adequate, and as we construe the decisions, exclusive, remedies in Federal Trade

forcement suit to make its defense under all procedural and substantive guaranties of the Constitution.[21]

That is true, unless, as plaintiff contends, the fact that its day in court under the statute is one of defense rather than offense, or both, renders its remedy or protection inadequate. It complains that the statute balances the scales of justice unevenly by permitting the employees to sue and not giving to itself the same right.

If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might therefore have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different.

Commission v. Claire Furnace Co., 274 U. S. 160 (1927), and Federal Trade Commission v. Maynard Coal Co., 57 App. D. C. 297, 22 F. (2d) 873 (1927). In our view, the enforcement procedure prescribed by Sections 9 and 10 of the Federal Trade Commission Act is not distinguishable from that presently involved, either by the fact that in the former the suit was instituted by the Attorney General, in his discretion and at the request of the Commission, or by the fact that the orders were to file reports with it rather than *decisions* concerning contract rights and adjustment of private disputes. As to the first asserted ground of distinction, the Attorney General's discretion was a limitation upon the Commission's power to institute the enforcement suit, not a grant of power to the complainant to set it aside. Plaintiff complains here, not because defendant can institute the enforcement suit or because his power to do so is not limited by a discretion given to a public official, but because it is not given the right to sue to set aside the award. As to the second ground, it may be doubted whether persons are entitled to greater protection, in the constitutional sense, respecting contract rights and disputes concerning them than they are with respect to inquisition concerning private business affairs and possible publication of the information derived from it.

Except in respect to the initiative in litigation, analogies to the enforcement procedure presently before us may be found in the procedure prescribed by Section 4915 R. S. (35 U. S. C. § 63) for obtaining a patent, in which the issues are triable *de novo* on all the competent evidence, General Talking Pictures Corp. v. American Tri-Ergon Corp., 96 F. (2d) 800 (C. C. A. 3d, 1938), but the adverse decisions of the Patent Office, by reason of its expert technical knowledge, are entitled to great weight, Abbott v. Coe, 71 App. D. C. 195, 109 F. (2d) 449 (1939); and also in proceedings before the Board of Tax Appeals, in which the determination of facts by the Commissioner of Internal Revenue is regarded as prima facie correct. Flynn v. Commissioner of Internal Revenue, 77 F. (2d) 180 (C. C. A. 5th, 1935); Mente v. Commissioner of Internal Revenue, 76 F. (2d) 965 (C. C. A. 5th, 1935); Green's Advertising Agency v. Blair, 31 F. (2d) 96 (C. C. A. 9th, 1929); *cf.* Phillips v. Commissioner of Internal Revenue, 283 U. S. 589 (1931).

[21] *Cf.* Nickey v. Mississippi, 292 U. S. 393 (1934); Pike v. Walker, App. D. C. , 121 F. (2d) 37 (1941); Montana Power Co. v. Public Service Commission, 12 F. Supp. 946 (D. Mont. 1935), *rev'd on other grounds*, 299 U. S. 167 (1936); Cook v. Des Moines Union Ry., 16 F. Supp. 810 (S. D. Iowa 1936); 16 C. J. S. 1280. See also Crowell v. Benson, 285 U. S. 22 (1932).

And in this lies a stronger answer. It is the fact that unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such a suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights it can maintain the existing practices. The Act confers upon the employer the powerful advantage of defensive position in respect to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone.[22] If not, he loses at any rate the special advantages of the statutory suit.

In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit.

A further argument remains. It is that unless the carrier can maintain such a suit as this, the employees will elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards. Thus, it is said, the carrier will be deprived of its day of defense, and so of its only day in court. It is urged that the court should look at the facts of industrial and railroad life and determine the effects of the statutory provision for suit in their light. If that is done, the further fact cannot be ignored that carriers, as well as labor unions and employees, have economic bargaining power. They are not entirely defenseless in the face of threat of strike. Nor are railroad strikes so easily and readily called and put in effect that they are everyday occurrences. Employees, as well as employers, have a stake in avoiding them.[23] And there is elaborate provision in Section 2 of the Act for meeting the contingency of a strike.

There is nothing to show that the consequence feared will follow, except the unsupported and argumentative assertion that it will and the fact that few enforcement suits have been insti-

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[22] Otherwise the limitation of Section 3 First (q) [45 U. S. C. § 153 First (q)] would be meaningless. It is not contended that the remedy afforded the employee when the award is in his favor is inadequate. It may have been the philosophy of the Act to provide a reasonable period for litigation following the award and when that has passed to make an end of the whole matter by barring the employee's asserted claims.

[23] *Cf.* SPENCER, *op. cit. supra* note 11, at 64: "It is true, of course, that the controversies over which the Board has jurisdiction are not of such a character, generally speaking, that they produce strikes and other serious consequences. At the same time an accumulation of these minor controversies which cannot be settled quickly and equitably tends to breed suspicion and distrust on the part of employees, and, of course, may result in major controversies." The major causes of strikes, *i. e.*, those involving questions of representation for collective bargaining, making of collective agreements, etc., are committed to the Mediation Board rather than the Adjustment Board, by Section 2 of the Act. *Cf.* SPENCER, *op. cit. supra*, at 30.

tuted.[24] This might mean that the carrier supinely accepts all adverse decisions of the Board, though believing them erroneous. On the other hand, it may mean that the Board has done its work well or with reasonable satisfaction to the disputants.[25] That this may be true is shown to some extent by the fact that a large percentage of its decisions have been favorable to the carrier.[26] The provisions for majority vote of the bi-partisan Board and for selection of referees in cases of deadlock go far to assure fair hearing and decision. It is entirely possible that both carriers and employees prefer acceptance of decisions so rendered to incurring the heavy expense and long delay incident ordinarily to final judicial decision in enforcement suits.[27] It is not alleged that strikes or threats of strike to secure employees' demands of this character have been more frequent than they were before the amendments of 1934 which created the National Railway Adjustment Board and its procedures.

Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise. That it has done, as the results attest.[28] The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined.[29] Whether such action would be lawful or unlawful, the mere possibility that employees may resort to it rather than to suit is not enough to make the latter inadequate constitutionally as protection for the carrier's rights. The weight of that possibility is properly within the discretion of Congress in determining whether the initiative in litigation shall be given to one party or the other, particularly where as here it has given no final or conclusive effect, as against the party put upon the defensive, to the cause of action to be asserted. The fact that one party to a dis-

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[24] So far as we have discovered, the only reported case thus far brought to enforce an award is Estes v. Union Terminal Co., 89 F. (2d) 768 (C. C. A. 5th, 1937). It is understood that other cases are now pending in the courts to secure enforcement.

[25] *Cf.* Garrison, *op. cit. supra* note 10, at 592, 593. See also FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 185-8; SPENCER, *op. cit, supra* note 11, 49 *ff.*, 63; Administrative Procedure in Government Agencies, SEN. DOC. No. 10, Part IV, 77th Cong., 1st Sess. (1941).

[26] *Cf.* note 11 *supra.*

[27] For instance, Moore v. Illinois Central R. R., 312 U. S. 630 (1941), though not an enforcement suit, illustrates the possibilities for delay in judicial disposition of these controversies. The litigation originated in the state courts of Mississippi in October, 1932, though the suit in which that decision was rendered was not begun until 1936. Since then, through nine years, it has wended its tortuous way, back and forth through state and federal courts, until it reached the Supreme Court and was decided on March 31, 1941. Now it is on its way back again for another round. This circle of litigation, reminiscent of that pointed out in the dissent in McCart v. Indianapolis Water Co., 302 U. S. 419, 423, 437 (1938), hardly comports with the promptness required by purposes of the Railway Labor Act as stated in Section 2, though it may afford a maximum of orderliness. The present litigation might be cited also to the same effect.

[28] It is not alleged that any strike has been instituted to enforce an award. In one instance a strike ballot was taken. Garrison, *op. cit. supra* note 10, at 591, note 94. See also FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD (1935) 29; SECOND ANNUAL REPORT (1936) 34.

[29] Possibly the answer would depend on whether the award conforms to the employees' rights as finally determined judicially. If so, and the two should coincide, the strike would not be unlawful.

pute which is litigable may undertake to settle it illegally does not render a legal remedy, adequate within itself, inadequate.

It is urged also that the statutory suit is inadequate because, if no other remedy is available, the employer will face a dilemma, namely, to obey the award, thereby risking a suit for breach of contract by the tenant lines' road engine crews; or to disobey it, thus incurring the risk of having to pay both the road engine crews for doing the work or for not letting them do it and defendants' accumulated demands for the same work, though they will not have done it. Accordingly, plaintiff says it must build up a large fund to guard against these contingencies and should be relieved from this burden.

We are not impressed with the force of the argument as establishing either the constitutional inadequacy of the enforcement suit or (since the two come to substantially the same thing in these circumstances) the intention of Congress not to make it exclusive.

In the first place, if we assume that the dilemma is presented in the full force of plaintiff's statement, we do not agree that permitting plaintiff to maintain the present suit would give it certain escape. The contrary argument assumes that the decision on the merits would be in plaintiff's favor and would be rendered more promptly than plaintiff could secure final determination of its rights under the provisions of the Railway Labor Act. Neither assumption can be made. Of course, defendants' claims would be disposed of and the dilemma would be resolved by a decision in plaintiff's favor. But it is hardly probable that this could be accomplished in the ordinary course of litigation within the two years allowed the employee to bring his enforcement suit.[30] After that time the statutory bar against his suit would appear to make recourse to the courts by the carrier unnecessary.[31] We cannot assume that the decision on the merits would be in the employer's favor. If it were otherwise, it is true that the rights existing under the contract would be adjudicated as between the plaintiff and the defendants. But that would not be true as to any rights of the tenant lines' crews against the plaintiff. They are not parties to this suit, the collective agreement or the award. The contract or arrangement under which they do the disputed work is not in evidence or in issue. Their rights, therefore, could not be determined in this suit. *Cf. Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936). Consequently, a decision in favor of the defendants could not relieve the plaintiff from its dilemma. The tenant lines' crews could assert their claims in other litigation. It is therefore highly questionable whether permitting plaintiff to have declaratory relief would give it a more prompt and certain escape than is afforded under the Railway Labor Act. If the enforcement procedure, including the statutory bar, is inadequate for failure to afford relief from the dilemma, the declaratory judgment suit, as it is sought to be maintained here, is hardly less so. Constitutional inadequacy of one remedy is not cured by substitution of another which is equally inadequate or substantially so.

But we do not believe the dilemma is as strong as plaintiff makes it appear. The record does not show that it is under any contractual obligation to the tenant lines or their employees to have the latter perform the work. As the dissenting opinion points out, it may be inferred from statements in the pleadings and the briefs on appeal that the expense of the service done by the train crews is borne by the plaintiff. But it is not shown that this is pursuant to any con-

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[30] See 27 supra.

tract which gives them the right to do this work. It appears merely that there has been a "*practice* to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay *to the Tenant Lines*, sums equal to the reasonable value of said services." (Italics supplied) It does not appear that the tenant lines' employees have any personal claims against the plaintiff or that they or the tenant lines themselves have any contractual right to do or continue doing this work. The largest permissible inference is that the tenant lines have a right, under the practice which has been followed, to be reimbursed by plaintiff for the value of the services actually rendered by their employees. On the record before us plaintiff could change its operating practice at will and without further liability than to pay the tenant lines the value of the work done prior to the change. The supposed dilemma, therefore, is not one created by inconsistent contractual obligations giving others the right to do the work or serious probability that they will be asserted. It is entirely immaterial that the work has been done by the tenant lines rather than by plaintiff in some other way. Whether it is done by plaintiff itself or by others, plaintiff must bear its cost. That is an inevitable consequence of its decision not to put the award into effect. So is the risk that the employee may succeed in an enforcement suit and thus subject plaintiff to possible liability for damages for breach of the collective agreement.

The dilemma therefore boils down to the fact that plaintiff will have to bear the expense of having the work done, consequent to its own election not to accept the award, and, if an employee succeeds in an enforcement suit, whatever damages for breach of the collective agreement may be claimed and proved. These consequences of its election to maintain the *status quo* cannot have been without the contemplation of Congress when it adopted the enforcement procedure. They hardly present the difficulties which would arise from independent agreements allocating the work to different persons or groups. We do not think the enforcement procedure is made constitutionally inadequate merely because the carrier prefers, as is its right, not to put the award in force, but to follow an advantageous practice which it could change at will and, consequently, to incur the necessary expense of doing so.

But, if it were shown that the carrier had bound itself by conflicting contracts allocating the work, and thus the dilemma were complete, it would not follow that the enforcement suit is inadequate or was not intended to be exclusive or that declaratory relief would be appropriate. We know of no constitutional protection against the consequences of making inconsistent contracts concerning the same subject matter nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result and perhaps succeed in sustaining them by independent litigation. The risk of multiple liability, that is, the possibility that two or more claimants may assert, severally and independently, similar causes of action covering identical subject matter, is an everyday occurrence. That risk presents a common and peculiarly appropriate situation for declaratory relief when it can remove the risk and other adequate relief is not available. But so to apply the declaratory judgment procedure is vastly different from applying it where, as here, it could not remove the risk and where it would displace a special remedy provided for decision of

highly complex and specialized questions. The primary purpose of the Declaratory Judgments Act is to give relief in situations in which it was not previously available, not to displace existing and, particularly, special remedies devised for peculiar situations. Nor is it intended to remove all risk of multiple liability. That, unfortunately, is a function not covered as yet by legal invention.

Finally, if it were clear that allowing plaintiff to maintain this suit would eliminate or minimize its risk of multiple liability, that advantage to plaintiff still would have to be weighed against the corresponding disadvantages created for the employees and the adverse effects upon the whole statutory plan. Plaintiff's disadvantage under that plan comes down to having the initiative in litigation concerning awards given to the employees for two years. That price hardly seems unreasonable for Congress to exact in exchange for the strong defensive position given the employer with respect to the award and the prompt disposition of disputes which the Act has made possible. The statute denies the employee the more usual advantages of administrative decision, namely, immediate effectiveness unless stay is secured, limitation of judicial review to questions of law, enforcement by public authority, etc. It gives him only decision, not action, by the Board. It puts upon him the whole burden of enforcement. In view of all these relative advantages and disadvantages, we find no essential unfairness in leaving to the employee the decision whether the award shall be enforced and limiting the period in which his decision can be made to two years. Certainly there is no discrimination beyond the power of Congress to create. Suspension of the carrier's initiative in litigation for that period of time is not an infringement of constitutional right. As we have said, to hold otherwise would disrupt the working of the Railway Labor Act, as well as deprive the employee of the statutory special advantages in the enforcement suit. These consequences forbid the implication that Congress intended them.

The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore* v. *Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. When it chooses the latter, we think it is bound to follow it through to the conclusion prescribed by the statute. Such a choice is made, we think, not only when the carrier submits or joins in submitting the dispute to the Board, but when, under submission by an employee, it appears before the Board and participates in a full hearing on the merits. Having done these things, had the chance of a favorable decision, and finally, when it has lost, been confronted only with an order not enforceable except by a suit which has not been brought, which it seeks in effect to forestall by this one, and in which, if begun, it would have had a full day in court, plaintiff cannot complain that it has not had complete opportunity to protect its rights or that they have not been protected adequately.

What plaintiff attacks, fundamentally, is the whole idea of the enforcement suit plan. The provisions for the enforcement suit are unusual. Some of the features of the administrative phase of the statute are unique. But enforcement suits are not unknown,[32] and

[32] *Cf.* Sections 16 (1), 16 (2) of the Interstate Commerce Act [34 STAT. 590 (1906), as amended by 36 STAT. 554 (1910) and 41 STAT. 491 (1920)] and Sec-

neither the fact that they are unusual nor the other that the administrative provisions and procedure are unique renders the Act unconstitutional. It is the total effect of the two phases, not the segmented effect of the first, which must determine that question. The administrative phase has been criticized. On the other hand, it has been commended. No doubt there is room for considerable improvement.[33] But these matters are for Congress' judgment. The present Act has evolved from a long legislative history. Many of its unique features are derived from that.[34] Though the administrative features are frankly not in the accustomed traditions and methods of courts and lawyers,[35] the enforcement suit follows them except possibly as to the initiative in litigation. That it may not do so in this single respect does not, as has been shown, deprive the carrier of legal protection according to due process of law.

Nor does it that Congress may have intended to discourage resort to the courts for enforcement of awards and settlement of these disputes after the initial stages of private negotiation and administrative decision, thus securing the prompt disposition which the Act avowedly sought.[36] If that was Congress' intent, its constitutional power over the jurisdiction of the federal courts sustains it both in providing the remedy which it has given and in excluding others. Though some of them were decided before, and at least one after the *Moore* decision was rendered, the decisions cited below, or their implications, appear to bear this out.[37]

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tion 309 (f) Packers and Stockyards Act [42 STAT. 166 (1921)]. As to the former, see Brady v. I. C. C., 43 F. (2d) 847 (N. D. W. Va. 1930), *aff'd*, 283 U. S. 804 (1931); Baltimore & O. R. R. v. United States, 87 F. (2d) 605 (C. C. A. 3d, 1937); Baltimore & O. R. R. v. Brady, 288 U. S. 448 (1933), in the last of which the Court held that claimant, having elected to pursue his administrative remedy before the Commission, was not entitled to recover more than the amount of the award, though he might have done so by suing originally in the district court. See also Meeker v. Lehigh Valley R. R., 236 U. S. 412 (1915), and St. Louis & S. F. R. R. v. Spiller, 275 U. S. 156 (1927); Minds v. Pennsylvania R. R., 237 Fed. 267, 270 (E. D. Pa. 1916), *aff'd*, 244 Fed. 53 (C. C. A. 3d, 1917) and 250 U. S. 368 (1919). Compare note 20 *supra*.

[33] *Cf.* Garrison, *op. cit. supra* note 10, at 593-8; and the guarded recommendations of the Attorney General's Committee on Administrative Procedure, FINAL REPORT (1941) 185-8.

[34] *Cf.* SPENCER, *op. cit. supra* note 11, at 8-12; Garrison, *op. cit. supra* note 10, at 568-76; and the FINAL REPORT, cited in the preceding note, at 185.

[35] *Cf.* Garrison, *op. cit. supra* note 10, at 598: "It is difficult to conceive of the Board's being able to discharge its functions under any set-up which would fit within these traditional legal concepts."

[36] *Cf.* Meeker v. Lehigh Valley R. R., 236 U. S. 412 (1915); St. Louis & S. F. R. R. v. Spiller, 275 U. S. 156 (1927). In Cook v. Des Moines Union Ry., 16 F. Supp. 810, 813 (S. D. Iowa 1936), Dewey, District Judge, said, with reference to the provision of the Act that the award "shall be final and binding upon both parties": "It is unnecessary to determine whether or not this might be a depriving of due process in certain cases . . . The purport of the act may be to provide that the award made by an Adjustment Board shall be final so long as it is not attempted to be enforced . . . Therefore there is no deprivation . . . of any rights unless and until the suit is filed in the District Court . . . When this is done it becomes an action at law with the right of a jury. The entire case is open for trial as a law action on the original suit."

[37] See Railroad Yardmasters of North America v. Pittsburgh & Lake Erie R. R., 39 F. Supp. 876 (N. D. Ohio 1940). See also Adams v. New York, Chicago & St. L. R. R., F. (2d) (C. C. A. 7th, 1941), 3 C. C. H. Labor Service 60,509, decided after the decision in the *Moore* case was rendered, and distinguishing Nord v. Griffin, 86 F. (2d) 481 (C. C. A. 7th, 1936). However, on June 24, 1941, the opinion was withdrawn, to the extent that it conflicted with the *Moore* decision, and a judgment of reversal was substituted for the previous one affirming action of the district court in refusing to exercise declaratory jurisdiction (C) (1941)

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Finally, this is a suit for a declaratory judgment. The remedy is discretionary.[38] We do not believe a carrier, consistently with the Railway Labor Act, could maintain a suit in equity to set aside an award or enjoin its enforcement. The statute seems clearly to exclude such suits by specifying enforcement suits solely as a method of review, and the absence of reported cases showing attempts to maintain other types of suit supports this view. The declaratory action has much of equitable quality in regard to the discretion which should be exercised in allowing relief. Its effect here, if plaintiff should be successful, would be substantially the same as setting aside the award or enjoining enforcement. Consequently, we can see no valid reason for excluding these remedies which does not apply with equal force to that by declaratory judgment, whether as a matter of Congressional intent or one of judicial discretion in allowing that relief. To allow it also would deprive the employee of his special advantages in litigation. It would displace another, and in our view, an adequate judicial remedy specially devised for the particular situation. When this is the effect, courts generally deny declaratory relief.[39] The doctrine of "primary jurisdiction" [See Note (1938) 51 Harv. L. Rev. 1251] and considerations of comity toward a specialized administrative tribunal charged to deal with such matters lend weight to the view that it should be denied in these circumstances. The former has been applied most frequently when the administrative body has exclusive jurisdiction, or where exhaustion of the administrative remedy is required, to prevent the suit from being premature or to give the court the benefit of the administrative judgment in advance of its own action. The present case is one appropriate for the same attitude, even though it was not regarded as appropriate for the situation in *Moore* v. *Illinois Central R. R.*, *supra*. Furthermore, the railroad employees who are now doing the disputed work, or their union representatives, have not been made parties to the action. Their rights may be affected by the result. In these circumstances also declaratory relief ordinarily is refused.[40] All these considerations apply not only to show the intention of Congress, but also to guide the court's discretion toward denial of declaratory relief.

The reasons we have stated support the view that the court did not have jurisdiction to entertain the present suit. But, whether or not it had jurisdiction, the action was premature. For practical purposes it matters little whether one or the other reason constitutes the basis for decision. The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue or was intended, with other provisions of the Act, to bar it altogether. It seems clear that the limitation upon the employee's right to sue was intended to bar action by him after the two years expire; otherwise it would be meaningless.[41] That being true, his failure to sue within the time might be regarded reasonably as disposing finally of his claims determined by the award. Correspondingly, it might be held, with reason, that there would be no need for suit by the carrier after that time, and therefore that the court was deprived of jurisdiction. But we need not and do not decide whether either the

[38] *Cf.* BORCHARD, DECLARATORY JUDGMENTS (2d ed., 1941) 298-314.

[39] *Id.* at 342-346, and authorities cited; 16 AM. JUR. 295, § 21.

[40] *Cf.* BORCHARD, *op. cit. supra* note 38, at 255, 299, 304. See also Section 6, Declaratory Judgments Act.

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employee or the employer could sue after expiration of the two years. The facts do not present these questions. But, in any event, if it is assumed that the employer may wait until the period of limitations has passed and then bring its action, its right to bring it within that time is clearly barred. If that were not true the statute would be meaningless in giving the employee the initiative in litigation and the special statutory advantages, as well as in placing a limitation upon the time for his suit.

There is no escape from this conclusion in the assertion that this suit is one to enforce rights arising under the original agreement, not to review or nullify the award, and therefore the statutory bar or suspension does not operate against it. As we have said, the fundamental issue presented in this action is identical with that determined by the award and with that which would be decided by an enforcement suit, namely, whether the employees have the right under the contract to do the work in dispute. That issue cannot be decided in independent litigation and in favor of plaintiff without nullifying the award and the consequences which the statute attaches to it in the enforcement suit. To assert therefore that the only rights involved in this suit are rights arising at common law under the contract, and that the rights given to the employee by the statute are not affected or involved, is either to beg the question or to ignore the inescapable effects of this suit, and the relief it would afford, upon the latter. What the plaintiff really seeks to do is to have all of the advantage of the statutory plan up to the point of the award and enforcement, and to escape from its disadvantages thereafter. We do not think it is so entitled to have its legal cake and eat it too.

Limiting the decision therefore squarely to the facts and the issues which they present, we find no constitutional inadequacy in the protection afforded to the plaintiff under the provisions of the Railway Labor Act, merely by reason of the fact that its right to initiate litigation to nullify an award is barred or suspended for a period of two years.

The judgment is

Affirmed.

STEPHENS, *Associate Justice*, dissenting. This is an appeal from an order of the District Court of the United States for the District of Columbia dismissing the complaint of the appellant. The complaint was for a declaration, under the powers given United States courts by the Declaratory Judgments Act (Act of June 14, 1934, 48 Stat. 955, as amended by Act of August 30, 1935, 49 Stat. 1027), of the rights of the appellant and the appellees under a certain collective bargaining contract of February 1, 1923. The appellees, defendants below, filed an answer setting up three defenses. The first was that the complaint failed to state a cause of action, the second, that it did not state a cause of action appropriate for the granting of a declaratory judgment.[1] The court below considered these two defenses as in the nature of a motion to dismiss and its dismissal of the complaint was upon

[1] More particularly, the second defense said that the allegations of the complaint did not state a cause of action appropriate for the granting of the declaratory judgment against the defendants because:

"(1) The complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.

"(2) The complaint affirmatively shows that there exists a remedy specially provided by statute for this type of case.

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such motion. In view of the disposition of the case on the first and second defenses, the third defense was not considered. The case is thus before the court upon the facts set forth in the complaint as admitted by the first two defenses treated as a motion to dismiss. These facts are set forth in detail in the margin.[2] Stated in general and summary terms they are as follows:

The appellant is a corporation which since 1907 has operated the Union Passenger Station, including an adjacent railroad yard and tracks, hereinafter sometimes called the Terminal, in Washington, District of Columbia. The appellees are enginemen and firemen employed by the appellant who operate switch engines over the tracks in the yards. These yards and tracks and the passenger station are facilities used by the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company—called the Tenant Lines—operating passenger trains from points outside of Washington to Washington, from Washington to points outside, and from points outside through Washington to other points outside. In addition to the movement of loaded passenger trains into, out of, and through the Terminal, certain other train or car movements—the right to make which is involved in this case—have since 1907 taken place and now take place over the tracks of the appellant: Empty passenger trains which have discharged their passengers at the station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have

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"(3) The complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

"(4) The complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff."

[2] 1. The appellant Washington Terminal Company is a corporation which has since 1907 operated the Union Passenger Station, a union railroad terminal, hereinafter sometimes called the station or the Terminal (where the word "station" is used it refers to the passenger station building and sheds proper) in the District of Columbia. The appellees are employees of the appellant performing services in the Terminal as enginemen or firemen on yard engines used in switching service.

2. The appellant itself operates no passenger trains and employs directly no road engine or road train crews. All passenger trains which use the Terminal are operated by one or more of certain railroad companies known as the Tenant Lines, to wit, the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company. The trains operate for the major portion of their runs on the tracks of one or more of the Tenant Lines between Washington and various other cities, and they use the tracks and facilities of the appellant for only a short distance in entering and leaving the Terminal.

3. The movement of loaded passenger trains from points outside of Washington into the Terminal, from the Terminal to points outside of Washington, and through the Terminal from points outside of Washington to other points outside, is performed and has always been performed since the opening of the Terminal exclusively by road engines manned by road engine crews of the Tenant Lines.

4. When passenger trains begin or end their runs at Washington, such road engine crews are and have always been required by the Tenant Lines to deliver the road engine to the enginehouse at the end of a run and to bring the road engine from the enginehouse to the station at the commencement of a run. Thus

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come into the station one or more cars are sometimes cut off from the head end of the train and removed in a single movement to some designated track; where a train of passenger cars is standing in the station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of the train on its journey over the road; when trains of passenger cars have come into the station and discharged their passengers, the empty trains are sometimes moved a sufficient distance to permit the road engine which has brought the train into the station to be uncoupled from the train and proceed by a cross-over movement to another track. Many movements of the kinds just described are and always have been, since the commencement of operation of the Terminal in 1907, performed (where in the judgment of the managing officers of the appellant efficiency or promptness in the operation of the Terminal is thereby promoted) by the use of the road engine which has brought the train into the station or is about to haul the train to its destination, incidental to the movement of the road engine between the station and the enginehouse. In making such movements the road engine is and always has been manned by the road engine crew which is required as a part of its duties to deliver the road engine to the enginehouse at the end of a run and to bring the road engine

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the road engines when so operated over the appellant's tracks between the passenger station and the enginehouse are and always have been manned by the Tenant Lines' road engine crews.

5. In addition to the movement of loaded passenger trains into, out of, and through the Terminal, certain other movements of equipment take place over the tracks of the appellant as follows: Empty passenger trains which have discharged their passengers at the station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have come into the station one or more cars are sometimes cut off from the head end of the train and removed in a single movement to some designated track; where a train of passenger cars is standing in the station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of the train on its journey over the road; when trains of passenger cars have come into the station and discharged their passengers, the empty trains are sometimes moved a sufficient distance to permit the road engine which has brought the train into the station to be uncoupled from the train and proceed by a cross-over movement to another track. Many movements of the kinds just described are and always have been, since the commencement of operation of the Terminal in 1907, performed, where in the judgment of the managing officers of the appellant efficiency or promptness in the operation of the Terminal is thereby promoted, by the use of the road engine which has brought the train into the Terminal or is about to haul such train to its destination, incidental to the movement of the road engine between the station and the enginehouse; and in making such movements the road engine is and always has been manned by the road engine crew which is required as a part of its duties to deliver the road engine to the enginehouse at the completion of a run and to bring the road engine from the enginehouse to the station at the commencement of a run.

6. Movements over the tracks of the appellant other than those described in paragraphs 4 and 5 above are made and have generally been made by yard-engines of the appellant manned by yard-engine crews employed by the appellant.

7. On June 1, 1910, the appellant published certain rules and regulations for yard-engine firemen in its employ, defining the terms of employment and the rights of employees thereunder; on September 1, 1911, the appellant published certain rules and regulations for the government of yard enginemen in its employ, defining the terms of employment and the rights of the employees thereunder. These regulations separately defining the employment of yard firemen and yard enginemen were superseded on December 1, 1919, by a "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" entered into by and between the Director General of Railroads of the United States on behalf of the Washington Terminal Railroad (the appellant) and the enginemen, firemen and

from the enginehouse to the station at the beginning of a run. The road engine crews are employees of the Tenant Lines.

On February 1, 1923, the yard enginemen and firemen, employees of the appellant, acting through the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as collective bargaining representatives, entered into a seniority agreement defining the terms of employment of enginemen and firemen. This superseded several previous agreements on the same subject. After the passage of the Railway Labor Act of 1934 (Act of June 21, 1934, 48 Stat. 1185), which set up a National Railroad Adjustment Board, hereinafter sometimes called the Board, for the adjustment of disputes between carriers and their employees, the appellant's employees asserted that under the agreement of February 1, 1923, they were entitled to perform the train movements above described as involved in this case. The appellant rejected the claim. Thereafter the employees carried the dispute, as under the Railway Labor Act they might, to the Board, to which they submitted their claim in writing; and the appellant, as it was obliged to do under the statute, separately stated its contentions to the contrary of the claim. The Board, acting through its First Division of ten members, deadlocked, but, upon the selection of a referee as an eleventh member, it

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trainmen employed thereon represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, respectively. On February 1, 1923, the appellant entered into an agreement with the yard enginemen and yard firemen in its employ represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, respectively, entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen." This agreement remains and has remained in effect since its date as the only contract existing between the appellant and the enginemen and firemen in its employ, including the appellees, defining the terms of employment of enginemen and firemen. This agreement contains provisions establishing certain rights of seniority as between the appellant's employees belonging to each respective class covered by the regulations or schedules therein contained, these provisions among other things entitling the employees of a given class to vacancies and new runs in the order of seniority of the applicants therefor, providing for seniority as a factor in promotion, and according recognition in similar respects to length of service in a particular employment.

8. At the date when the regulations of June 1, 1910, went into effect and continuously thereafter during the period when the various regulations and schedules above referred to were successively in effect and continuously during the period since the schedule of February 1, 1923, has been in effect, the uniform and continuous usage and practice has been for movements of the character described in paragraph 5 above to be made by road engines manned by road engine crews of the Tenant Lines whenever in the judgment of the appellant's managing officials efficiency or promptness in the operation of the Terminal was thereby promoted; and a large proportion of such movements have always been and are being so performed by such road engines and road engine crews.

9. By Act of Congress of June 21, 1934 (48 Stat. 1185), entitled "An Act to amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees," there was established a board known as the "National Railroad Adjustment Board" with jurisdiction over disputes growing out of the interpretation or application of agreements between railroads and their employees concerning rates of pay, rules or working conditions, in the event that negotiations in respect of such disputes have failed to result in adjustment. The First Division (there are three others) of the Adjustment Board has jurisdiction over disputes involving yard and train service employees, including engineers, firemen, conductors, trainmen, and yard service employees. It consists of ten members, five designated by the carriers, and five by national labor unions of employees. Hereinafter sometimes this Division is referred to as the Board.

10. After the passage of the Railway Labor Act there was presented to the appellant by representatives of the firemen, enginemen and trainmen employed by

made an award on October 24, 1938, to the effect that the appellant's employees were entitled to perform the train movements in question. This award was made effective by an order of the Board of the same date. Except as the separate submissions filed with the Board may be regarded as such, the Board in considering the dispute received no pleadings or evidence and permitted no cross-examination; and it allowed no argument, written or oral, before the referee.

The appellant has never changed its operating practices to conform to the award. The Railway Labor Act authorizes a proceeding to enforce the award and order to be brought in an appropriate United States District Court by the persons for whose benefit the award was made, within two years from the time the cause of action accrues

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it a claim to the effect that the work being performed on the property of the appellant by road engines manned by road engine crews of the Tenant Lines, as described in paragraph 5 above, was work to which yard engine crews of the appellant were exclusively entitled by reason of seniority rights under the agreement of February 1, 1923. After negotiations between the appellant and representatives of the firemen, enginemen and trainmen had failed to result in agreement, the representatives, on March 29, 1937, invited the appellant to join with them in the submission of the claim to the Board. The appellant declined to do this on the ground that the claim was not based on violation of any agreement and amounted to a demand that operating practices should be abandoned which had existed continuously since the commencement of the operation of the Terminal. Notwithstanding such refusal by the appellant there was thereafter filed with the Board by representatives of the employees a claim reading in part as follows:

"It is the practice of The Washington Terminal Company to require tenant line road engines manned by tenant line road engine crews to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot and perform other switching service on tracks of the Washington Terminal Company. . . . Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

11. Thereafter within thirty days, pursuant to notification and requirement by the Board, the appellant filed its "submission" in answer to the claim, and at a date fixed by the Board the representatives of the employees and a representative of the appellant appeared before the Board at Chicago, Illinois. In accordance with the established procedure of the Board no witnesses were called to testify and no evidence was produced of the facts relied upon by the representatives of the employees in support of their claim, but these representatives made certain statements which were alleged to be facts and which were received by the Board without any opportunity being given to the appellant to cross-examine the representatives or otherwise to test the competency of their statements or to verify their existence as facts. At hearings before the Board the established procedure affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence in resisting the claims, and the procedure makes no provision for and does not permit the making of any record, stenographic or otherwise, of the proceedings before the Board. In accordance with this procedure no opportunity was given to the appellant to produce witnesses or by any other means to introduce evidence in resisting the claim presented by the representatives of the employees, and no record was made of the hearing.

12. Thereafter the Board was apparently unable to reach a determination of the claim, through deadlock or inability to secure a majority vote of the Board members, and, under the provisions of paragraph (1) of Section 3 of the Railway Labor Act, a referee was selected to determine the claim. In accordance with the established practice of the Board no opportunity was given to the appellant to appear before the referee and defend itself against the claim either by the presentation of evidence or oral or written argument, and the appellant was not notified by the Board that a referee had been designated to make an award.

13. Thereafter the referee decided the claim in favor of the employees and on October 24, 1938, this decision was adopted and published by the Board in a

under the award. No such suit had been brought by the employees at the time of the filing of the instant action on December 29, 1938. Nevertheless, the employees, shortly after the date of the award and order of October 24, 1938, to wit, on November 23, following, made demands—and they continue to make such demands—upon the appellant for moneys alleged to be due them for the train movements in question although, since the appellant has not changed its operating practices, the employees do not actually perform these train movements. These demands amount for the period from November 23, 1938, to the date of filing the complaint to approximately $7,500, and they are accumulating at the rate of $80,000 per annum. The con-

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form consisting of a complete verbatim reproduction of the ex parte submissions of the employees and of the appellant respectively filed with the Board, followed by the words:

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By order of First Division
Attest(s) T. S. McFarland

Secretary."

The Board served upon the appellant an "Order" "to make effective Award No. 3115, made by the First Division of the National Railroad Adjustment Board . . . as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before November 23rd, 1938."

14. The appellant has not complied with the order, but since the date thereof movements of the character described in paragraph 5 above have continued to be made, where in the judgment of the managing officers of the appellant promptness or efficiency in the operation of the Terminal would be promoted, by road engines manned by road engine crews of the Tenant Lines. Accordingly, under paragraph (p) of Section 3 of the Railway Labor Act the employees or any of them, as firemen or enginemen employed by the appellant in the operation of its yard engines and therefore as persons for whose benefit the Board order was made, have been at all times since the date of the order, and are, authorized and empowered to file in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which any one of such employees resides, a petition praying the court to make such order and enter such judgment as it may determine to be proper to enforce or set aside the order of the Board. But none of the employees has filed such a petition in the District Court of the United States for the District of Columbia or in any other District Court of the United States.

15. Notwithstanding that none of the employees has instituted any proceeding such as is referred to in paragraph 14 wherein the appellant would have opportunity and be entitled to show that the employees do not have any right under the contract of February 1, 1923, or otherwise, to perform movements of the character described in paragraph 5 above, and wherein the appellant might pray the court to set aside the order of the Board as unlawful, invalid and in excess of the jurisdiction of the Board, none-the-less the employees and each of them have, beginning November 23, 1938, presented, and are continuing to present, to the

tinuance of these demands and of the controversy concerning them may interrupt performance of the appellant's duty to serve the public. This action was filed by the appellant in the United States District Court to obtain a declaratory judgment of the rights and rela-

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appellant claims and demands for sums of money other than the full day's wages which the employees earn for each day on which they actually do work. These demands are based upon the employees' alleged right to perform movements of the character described in paragraph 5 above, which they are not in fact performing but which are being performed by road engine crews of the Tenant Lines. The demands so made by the employees are in the nature of claims for penalty payments and are in excess of the amounts which the employees would earn if they actually performed work of the character to which they claim they are entitled, many such demands being for another full day's pay in addition to the full day's pay which the claimants are already earning, the claim for such extra day's pay being based upon the fact that the claimant has not been given an opportunity to perform some one specific movement of the character mentioned in paragraph 5, the performance of which movement would involve only a few minutes work. These claims and demands are rapidly accumulating from day to day and amount for the period from November 23, 1938, to the date of filing the complaint (December 29, 1938) to a total of approximately $7,500, and are thus accumulating at the rate of approximately $80,000 per annum.

16. An actual controversy therefore exists between the appellant and the employees concerning their respective rights under the contract of February 1, 1923. This controversy resulted from the purported award of the Board of October 24, 1938, and comprehends the claims and demands, above described, upon the appellant for the payment of sums of money under the contract of February 1, 1923. The appellant is without an adequate and complete remedy at law in the premises and for want of such remedy is subjected to serious damage and inconvenience in this: There is no means by which the appellant can force or induce the employees or any of them to institute a judicial proceeding such as is referred to in paragraph 14. The Railway Labor Act provides no method whereby the appellant may petition any court of competent jurisdiction to set aside the award and order of the Board, and meanwhile the demands for money payments made by the employees are accruing and accumulating in the large amounts described. Although the issues, upon the determination of which the validity of the demands and the liability of the appellant to satisfy them depend, are as a matter of evidence and proof capable of present determination, the appellant, by reason of there being no judicial determination of its liabilities with respect to the demands, is compelled to maintain and make available substantial amounts of money to satisfy the demands in the event that the employees or any of them should subsequently institute legal proceedings to enforce the award and order, and in the event that it should in such proceedings be determined that the appellant is legally liable to pay the demands. If advised at the present time by proper judicial construction of its rights and liabilities under its contract with the employees, the appellant would, if necessary, be enabled, by making readjustments of its operating arrangements, to fulfill its obligations to the employees at less expense than by incurring the heavy penalty payments which the employees are now demanding. So long as the employees continue to make such demands without instituting legal proceedings wherein the validity of their demands can be adjudicated, and so long as the present controversy between the appellant and the employees with respect to their respective rights and liabilities under the contract remains without judicial determination, a serious impediment exists to the proper and adequate fulfillment of the appellant's obligation to serve the public which may, as a result of delay in securing an adjudication that will settle the controversy, ultimately impair and interrupt the performance of such service. By reason of each and all the facts set forth above the only remedy of the appellant, in order to avoid irreparable injury and damage, was to bring this suit in equity, praying a declaratory judgment or decree relative to the actual controversy described, and a declaration of the rights and other legal relations of the appellant and the appellees with respect to such controversy.

Wherefore the appellant prayed that the court render such a declaratory decree or judgment, including a declaration that the appellees have, under the seniority agreement of February 1, 1923, no legal right to perform the work in question, and that the award of the Board, insofar as it purports to confer such right upon them, is invalid.

tions of the appellant and the appellees under the seniority agreement of February 1, 1923—the appellant contending that the appellees have no right to the work in question under that agreement or otherwise and that the award purporting to confer any such right is invalid, and asserting that it has no other adequate remedy, that the enforcement proceeding is not such so far as a carrier is concerned.

But the question immediately involved on this appeal is not what are the rights of the parties under the contract. It is, broadly stated, whether or not a carrier, party to a collective bargaining agreement with its employees, may obtain a judgment in a United States District Court declaring the rights of the parties to the agreement, notwithstanding that a dispute arising out of the interpretation of the agreement has, at the instance of the other party, the employees, been submitted to the National Railroad Adjustment Board and made the subject of an award and order by the Board in the employees' favor. I think that the carrier is entitled to such a judgment.

I

The Federal Declaratory Judgments Act provides, so far as immediately pertinent:

> (1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such. [Act of June 14, 1934, 48 Stat. 955; as amended by Act of August 30, 1935, 49 Stat. 1027.][3]

The facts stated in the appellant's complaint and admitted by the motion to dismiss constitute an orthodox cause for declaratory relief. From them there appears the existence of a dispute between the appellant and the appellees concerning the meaning of an agreement to which they are parties. The appellees have presented claims to the appellant for money—the theory of the claims being that the contract of February 1, 1923, entitled them to do certain work; the appellant contends that the contract does not entitle them to do that work. The demands of the appellees are made under the contract, not under the award or order of the Board. This was conceded by the appellees in the court below.[4] Thus the complaint is one for declaration of

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[3] Additional provisions of the Act are the following:

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

[4] The Memorandum Brief filed by the appellees as defendants in the trial court was made a part of the record on appeal. In that brief the appellees said: "These claims, however, are *based upon the Agreement of* 1923—*not upon the order of the Board.*" R. 117. ". . . when the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect

"rights and other legal relations" of the parties to a contract. And the case is one of "actual controversy." It is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937). It is "a real and substantial controversy admitting of specific relief under a decree of a conclusive character." *Idem. Cf.* also *Maryland Casualty Co.* v. *Pacific Oil and Coal Co. and Joe Orteca*, 312 U. S. 270 (1941). Under the facts stated, daily demands for money are being made by the appellees under the contract, and refusal of payment is being made by the appellant; and the continuance of the controversy without adjudication is an impediment to the fulfillment of the appellant's duty to serve the public which may interrupt performance of that duty.

Moreover, under the facts, the appellant is obliged, in the absence of a declaratory judgment, to maintain moneys in large sums to pay the appellees' demands if ultimately held liable therefor, and as these are accumulating each day for each employee for the day's wages for work not performed, the appellant must either have to pay the full accumulation of these demands, if eventually held liable therefor, or waive its rights once for all and immediately change its operating practices at greater expense and less efficiency; but if the appellant is presently advised of its duties, it could if necessary now change its operating practices and thus save the heavy penalty payments being demanded. In *Aetna Life Ins. Co.* v. *Haworth*, *supra*, the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Speciality Co.*, 88 F. (2d) 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:

> . . . It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued. . . .

This statement is borne out by the legislative history of the Act. The Judiciary Committee of the Senate, in recommending its passage, said:

> It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed. [Sen. Rep. No. 1005, 73rd Cong., 2d Sess., 1934]

In Borchard on DECLARATORY JUDGMENTS (1934), the leading text on the subject, it is stated that one of the important functions of declara-

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and is in itself unenforceable. . . . The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued." R. 119. "It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923, and that it has existed for some time." R. 71.

tory judgment statutes is to afford an opportunity for determination of rights and liabilities under contracts. The author says (p. 405):

> . . . The opportunity to adjudicate such disputes without disruption of the relations between the parties, whether before or after purported breach, has demonstrated the utility and efficacy of the declaratory action, for it has enabled the parties to weather the storm of dispute without wrecking their legal craft and, on the contrary, to continue on the course with a clearly defined chart. Especially in long-term contracts has this proved an exceptional advantage, for it must be conceded that the traditional method of suing for damages on the first suggestion of breach frequently makes the continuation of the relation impossible. . . .

And see 16 American Jurisprudence 305, § 31, to the same effect.

Presumably declaratory judgment actions concerning contracts have in the majority of instances had to do with business contracts. But the suitability of declaratory relief for the determination of rights and liabilities under collective bargaining agreements is not to be doubted; it is indeed especially appropriate because of the public interest indirectly affected by such agreements. And both before and since the enactment of the Railway Labor Act of 1934 the courts have entertained proceedings for declaratory judgments as an appropriate remedy in respect of disputes arising out of agreements between carriers and their employees. See *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Burton* v. *Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 P. (2d) 72 (1934); *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936).

Since the appellant's complaint thus states a case appropriate for the exercise of the declaratory judgment jurisdiction of a United States District Court, and since under the due process clause of the Fifth Amendment to the Constitution the courts are open to all who present a controversy which is the proper subject of judicial action, it follows necessarily that the trial court should not have dismissed the appellant's complaint unless some expression of Congressional intent, some principle or policy of law of which Congress must be said to have known, some necessary implication of statutory language, or of legislative history, forbade exercise of the jurisdiction. The question is one of Congressional intent. Was it the intent of Congress that the declaratory judgment jurisdiction of the District Courts should not be exercised under the circumstances of the instant case?

II

No language of Congress in the Declaratory Judgments Act expressly excepts any cases of actual controversy, save those with respect to Federal taxes, from the jurisdiction of the District Courts to declare rights and other legal relations. No language of the Railway Labor Act of 1934 expressly forbids exercise of the declaratory judgment jurisdiction of the District Courts in respect of disputes arising out of collective bargaining agreements between carriers and their employees, or expressly vests in the District Courts, in the judicial enforcement proceedings provided for by paragraph (p) of Section 3 of the Labor Act, exclusive jurisdiction to determine or adjudicate the rights under such a collective bargaining agreement. One must therefore look to principles or policies of law, implications of statutory language, and legislative history, for an answer to the question in the case.

III

Declaratory relief is not new. It dates—so far as Anglo-American legal history alone is concerned—from several centuries ago in Scotland and from the middle of the nineteenth century in England. There was a declaratory judgments statute in Rhode Island in 1876, in Maryland in 1888, in New Jersey in 1915; and by 1934, the year in which the Federal act was passed, some thirty-four American states and territories had adopted declaratory judgments acts. See BORCHARD, *op. cit. supra*, 237-245. In the course of the growth of declaratory judgments law, principles or policies of limitation were judicially recognized; and it is to be assumed that Congress, in passing the Federal act, intended that the exercise of jurisdiction for declaratory relief should be subject to such limitations of principle or policy as had prior to the passage of the Act been judicially recognized. The appellees urge as one such limiting principle or policy that a remedy by declaratory judgment cannot be invoked as a substitute for any special statutory proceeding. This is put by BORCHARD, 156-7, thus:

> Where . . . a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose. This, however, is quite different from refusing a declaration merely because a general or common-law remedy might have been invoked.

To similar effect see 16 American Jurisprudence 295, § 21. Does the Railway Labor Act of 1934 provide a special statutory method or prescribe a statutory tribunal for the determination of the particular type of case presented in the appellant's complaint—with the effect of forbidding declaratory relief?

The Railway Labor Act of 1934 includes within its enumerated purposes that of providing "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." To this end the Act provides in substance and effect as follows: It is the duty of carriers and their employees to exercise every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of application of such agreements or otherwise, in order to avoid interruption to commerce or to the operation of a carrier. All disputes between a carrier and its employees are to be considered and if possible decided in conferences between representatives designated and authorized so to confer by the carrier and employees interested in the dispute respectively. The Act further states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. [Section 3(i)]

The Act then sets up an Adjustment Board, composed as a whole of thirty-six members, eighteen selected by the carriers and eighteen by the national labor organizations of the employees, each member to be compensated by the party or parties he is to represent. The Board is composed of four divisions. The first (with which we are here concerned) has jurisdiction over disputes involving train and yard service employees of carriers,[5] and consists of ten members, five designated by the carriers and five by the national labor organizations of the employees from the membership of the full Board. Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, such division is forthwith to agree upon and select a neutral person to be known as "referee" to sit with the division as a member and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock, a referee is to be selected and named by the National Mediation Board—which also fixes and pays the compensation of the referee.[6] The awards of the several divisions of the Adjustment Board are to be stated in writing and a copy furnished the respective parties to a controversy; and the awards are made "final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The Act provides that in case an award is made in favor of a petitioner, the division of the Board making it shall also make an order directed to the carrier to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled on or before a day named. Finally, the Act provides:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of

[5] The other three divisions have jurisdiction over disputes involving other classes of employees. The second and third divisions, like the first, consist of ten members each, five to be designated by the carriers and five by the national labor organizations of the employees. The fourth division consists of six members, three to be designated by the carriers and three by the national labor organizations of the employees.

[6] The National Mediation Board is a board established by the Railway Labor Act of 1934 as an independent agency in the executive branch of the Government. Section 3(1) of the Act provides: "Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees."

The Mediation Board has various other duties not here pertinent.

such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board. [Section 3(p)]

All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after. [Section 3(q)]

It thus appears that within the literal terms of the limiting principle as stated in the text of BORCHARD and American Jurisprudence, *supra*, the Congress has in the Labor Act provided a special statutory method and prescribed a statutory tribunal for the determination of the type of dispute involved in the instant case. And it is urged by the appellees that it is not proper to permit the instant dispute, because it is of the type referred to in the statute, to be made the subject of declaratory relief.

But an examination of the authorities cited by the two texts as evidencing the existence of this limiting principle demonstrates that by a "special statutory method" and a "statutory court prescribed" is meant an exclusive procedure or court. See *Moore* v. *Louisville Hydro-Electric Co.*, 226 Ky. 20, 10 S. W. (2d) 466 (1928); *Mayor of Devonport* v. *Tozer*, 2 Chancery 182 (1902); *Smeeton* v. *Attorney-General*, 1 Chancery 85 (1920); *Flint* v. *Attorney-General*, 1 Chancery 216 (1917); *Haan* v. *Haan*, 133 Misc. 197, 231 N. Y. Supp. 58 (1928); *Mutrie* v. *Alexander*, 23 Ont. L. R. 396 (1911); *N. Y. & O. Ry. Co.* v. *Township of Cornwall*, 29 Ont. L. R. 522 (1913); *Wight* v. *Board of Education*, 99 N. J. Eq. 843, 133 Atl. 387 (1926); *Union Trust Co.* v. *Georke Co.*, 103 N. J. Eq. 159, 142 Atl. 560 (1928) (modified, in other respects, in 105 N. J. Eq. 190, 147 Atl. 439 (1929)). And scrutiny of the authorities cited by these two texts also demonstrates certain grounds of decision which may be the necessary basis of distinction in respect of the instant case. Thus the following involve rights and liabilities not derived from the common law but from statute: *Moore* v. *Louisville Hydro-Electric Co.*; *Mayor of Devonport* v. *Tozer*; *Smeeton* v. *Attorney-General*; *Flint* v. *Attorney-General*; and *Haan* v. *Haan*, *supra*. In the following declaratory relief was refused upon the ground of the existence of another adequate remedy: *Oldham County ex rel. Wooldridge, County Attorney* v. *Arvin, County Road Engineer*, 244 Ky. 551, 51 S. W. (2d) 657 (1932); *Grand Junction Waterworks Company* v. *Hampton Urban District Council*, 2 Chancery 331 (1898); *Washington-Detroit Theater Co.* v. *Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *Stenzel* v. *Kronick*, 102 Cal. App. R. 507, 283 Pac. 93 (1929); *G. Goldberg & Sons* v. *Gilet Bldg. Corp.*, 135 Misc. 158, 237 N. Y. Supp. 258 (1929); *In re Sterrett's Estate*, 300 Pa. 116, 150 Atl. 159 (1930); *Kaaa* v. *Waiakea Mill Co.*, 29 Haw. 122 (1926); *Aetna Life Ins. Co.* v. *Richmond*, 107 Conn. 117, 139 Atl. 702 (1927); and *Kimmell's Appeal*, 95 Pa. Superior Ct. 488 (1929). And in the following declaratory relief was refused because the subject of the dispute was either pending in another action or was *res judicata*:

Proctor v. *Avondale Heights Co.*, 200 Ky. 477, 255 S. W. 81 (1923); *State* v. *Board of Com'rs of Wyandotte County*, 117 Kans. 151, 230 Pac. 531 (1924); *Leafgreen* v. *La Bar*, 293 Pa. 263, 142 Atl. 224 (1928); and *Shearer* v. *Backer*, 207 Ky. 455, 269 S. W. 543 (1925).

Cases especially cited by the appellees in support of the limiting principle above stated also variously deny declaratory relief for reasons similar to those above set forth: *City of Erie* v. *Phillips*, 323 Pa. 557, 187 Atl. 203 (1936), and *Bell Telephone Co.* v. *Lewis*, 313 Pa. 374, 169 Atl. 571 (1934), are rulings in terms of the proposition that a proceeding for a declaratory judgment will not be entertained where another statutory remedy has been specially provided for the character of case in hand. *Petition of Kariher*, 284 Pa. 455, 131 Atl. 265 (1925), contains a dictum to the same effect. But there was a special statute in Pennsylvania which governed the decision in these cases. Act of March 21, 1806, P. L. 558, 559, 4 Smith's Laws, pp. 326, 332 (46 PS § 156). That act provided in Section 13: "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." And it has been held in Pennsylvania that, by reason of the operation of this act, where a remedy or method of procedure is provided by statute it is exclusive. *Ermine* v. *Frankel*, 322 Pa. 70, 185 Atl. 269 (1936); *White* v. *Old York Road Country Club*, 318 Pa. 346, 178 Atl. 3 (1935); *In re Stetson's Estate*, 305 Pa. 62, 155 Atl. 856 (1931). Thus the statutory remedies, the existence of which were the foundation for the refusal of declaratory relief in *Petition of Kariher*, *City of Erie* v. *Phillips*, and *Bell Telephone Co.* v. *Lewis*, were necessarily exclusive. In *McCalmont* v. *McCalmont*, 93 Pa. Superior Ct. 203 (1928), there was an attempt to secure a declaratory judgment annulling a marriage The Pennsylvania legislature had prescribed detailed procedural requirements necessary to be followed for divorce and annulment. Declaratory relief was therefore refused upon the ground that the statutory remedy was exclusive and that the safeguards thereof to the interests of the state were not to be swept away by the Pennsylvania declaratory judgments act. In *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4th, 1937), the refusal of a declaratory judgment was upon the ground that there was another action pending involving the same issue, and upon the further ground that the declaratory judgment sought would not dispose of the entire controversy. *Young* v. *Bridges*, 86 N. H. 135, 165 Atl. 272 (1933), *Stewart* v. *Herten*, 125 Neb. 210, 249 N. W. 552 (1933), and *Moore* v. *Louisville Hydro-Electric Co.* (already briefly commented upon), again illustrate the proposition that by "special statutory remedy" is meant an exclusive remedy. In *Young* v. *Bridges* there was an attempt in a court of general jurisdiction to obtain a declaratory judgment as to the inheritance of personal estate. Jurisdiction to determine such inheritance had been committed to a probate court. In *Stewart* v. *Herten* it was sought to obtain by declaratory judgment a direction for a united corporate guardianship.

The county courts in Nebraska had by statute exclusive jurisdiction in guardianship proceedings. These two cases recognize that declaratory judgment statutes do not enlarge judicial jurisdiction in the substantive sense, but only procedurally. This is of course correct, and was recognized in *Aetna Life Ins. Co.* v. *Haworth*, and *Aetna Casualty & Surety Co.* v. *Quarles*, both cited *supra*. In *Moore* v. *Louisville Hydro-Electric Co.* declaratory relief in respect of rights under a Workmen's Compensation statute was refused upon the ground that declaratory judgment procedure did not supplant that of the Workmen's Compensation Board upon which the legislature of Kentucky had conferred exclusive jurisdiction in respect of industrial injuries.

It is urged by the appellees as a further limitation upon the exercise of declaratory judgment jurisdiction that it may not be used as a means for the review of administrative orders. Such a limitation is phrased by BORCHARD, *op. cit. supra*, 181, thus:

> . . . The declaratory action is not a substitute for a new trial, or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon.

In 16 American Jurisprudence 295-296, § 23, the limitation is more explicitly stated as follows:

> Questions already adjudicated by a court having jurisdiction of the subject matter and the parties cannot thereafter be the subject, between such parties and their privies, of an actual controversy within the meaning of this term in the Declaratory Judgments Act. The act is not intended to be used to elucidate or interpret judicial decrees or judgments already entered or to modify or declare rights thereunder. Hence, a declaratory judgment proceeding is not an appropriate method of obtaining the vacation of a judgment; and it would be entirely beyond the purpose and scope of the statute as well as contrary to fundamental principles for a court to attempt, in such a proceeding, to review and determine the validity of a judgment of a court of co-ordinate jurisdiction.

These statements are correct. But an examination of the authorities upon which they rest makes clear that they apply only where the prior judgment has been rendered by a judicial or at least quasi-judicial body. See: *Shearer* v. *Backer, supra; Back's Guardian* v. *Bardo*, 234 Ky. 211, 27 S. W. (2d) 960 (1930); *Ladner* v. *Siegel*, 294 Pa. 368, 144 Atl. 274 (1928); *Williamsport* v. *Williamsport Water Co.*, 300 Pa. 439, 150 Atl. 652 (1930); *Trustees of Columbia University* v. *Kalvin*, 226 App. Div. 775, 235 N. Y. Supp. 4 (1929). This is made clear also by a reading of the cases especially cited by the appellees in this particular connection (which include *Back's Guardian* v. *Bardo*, just mentioned). In *Back's Guardian* v. *Bardo* an action had been filed by an executor to sell certain real estate, to secure an order construing a will, and for partition of property, and a judgment had been rendered granting the relief prayed for. Subsequently, a declaratory judgment suit was brought by one of the parties. This suit propounded certain questions relating "to the construction of the will and the regularity of the partition proceedings in the prior action brought for that purpose, and to the proper distribution of the estate." Declaratory relief was refused upon the ground that "The purpose of the [Kentucky] Declaratory Judgment Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been

properly adjudicated." But the prior adjudication had been by a validly constituted judicial tribunal, the Circuit Court of Campbell County, Kentucky. In *Ferree* v. *Ferree*, 273 Ky. 238, 115 S. W. (2d) 1055 (1938), *Back's Guardian* v. *Bardo* was followed in a ruling that a declaratory judgment proceeding was not to be availed of to pronounce void a divorce and alimony decree with incidental disposition of lands. But again the decree had been rendered by a validly constituted court exercising judicial powers, the Circuit Court of Hardin County, Kentucky. In *Grooms* v. *Grooms*, 225 Ky. 228, 7 S. W. (2d) 863 (1928), infants, through a next friend, attempted to attack by a declaratory judgment proceeding a prior judgment rendered in another court authorizing the sale of their property. The Court of Appeals of Kentucky, ruling that the previous judgment was voidable only, not void, held that it could not be collaterally attacked in a declaratory judgment proceeding. Here again the prior judgment had been rendered in a tribunal of competent jurisdiction exercising judicial power, the Greenup County Circuit Court. In *Kings County Trust Co.* v. *Melville*, 127 Misc. Rep. 374, 216 N. Y. Supp. 278 (1926), a declaration as to the validity of a lease was refused where the lease had already been authorized by the judgment of a competent court, to wit, the Supreme Court of Kings County, New York. In *Haan* v. *Haan*, more briefly referred to *supra*, a petition was filed for a declaration that the infant plaintiff was the illegitimate child of the defendant and as such entitled to support. The petition was refused because in New York proceedings relating to a child born out of wedlock were within the special jurisdiction of the Court of Special Sessions of the City of New York, where a determination had already been had, which determination, never having been reversed, was held *res judicata*.

In *Central High School Athletic Association* v. *City of Grand Rapids*, 274 Mich. 147, 264 N. W. 322 (1936), also cited by the appellees, the Supreme Court of Michigan affirmed the action of the Superior Court of Grand Rapids, in Chancery, which in the exercise of its discretion had declined to issue a declaratory judgment determining rights which had already been passed upon by a Board of Zoning Appeals. But in that case an ordinance, the competency of which was not questioned, had made the decision of this Board final so far as it involved discretion or the finding of facts; and the decision of the Board had involved the exercise of discretion. It is to be noted also that zoning boards have jurisdiction to determine a class of rights created by statute, rather than having source in the common law, and assigned for adjudication to such boards as special tribunals.

The foregoing discussion of cases thus indicates that declaratory relief may be refused upon any of the following five grounds: First, that the prior determination sought to be attacked by declaratory judgment is of a judicial or quasi-judicial nature; second, that the subject of dispute is pending in another action or is *res judicata;* third, that another remedy is adequate; fourth, that the rights and liabilities involved in the dispute and with which another tribunal is authorized to deal derive not from the common law but have statutory origin; fifth, that a "statutory court prescribed" for the determination of a particular type of case has been given by the sovereign exclusive jurisdiction.

I think it clear that the refusal of declaratory relief in the instant case cannot properly be based on any of the first four of such grounds. As to the first ground—that the prior determination is of a judicial or quasi-judicial nature—that does not exist in the instant case, for the Adjustment Board is not a tribunal which either in composition or procedure is of judicial or quasi-judicial nature; and it did not in the instant case render its award upon such a hearing as entitles the award to be considered as having been judicially arrived at. The Board is bi-partisan in composition, one-half of the members being selected and designated by and for the purpose of representing the carrier and paid by the carrier, and the other half by and for the purpose of representing the employees and paid by them. It was conceded by the appellees before the trial court—and the concession is a part of the record on appeal—that:

> . . . The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.
>
> The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.
>
> In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.[7]
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> * * *
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> Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail.[8]

In the instant case, under the facts as pleaded and admitted by the motion to dismiss, when the dispute was before the Board there were no pleadings joining issue in the judicial sense of the term, but simply an ex parte submission by each side without reference to the submission of the other; no witnesses were called; no evidence was received except the ex parte submissions, if they may be called evidence, and these were without right of cross-examination; no record was made of the proceedings; the referee who cast the deciding vote in respect of the award considered no evidence except the ex parte submissions, and there was no argument before him, oral or written, by the parties or their representatives. The "findings" of the Board cannot properly be called findings of fact. The composition of the

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[7] R. 132-3.

[8] R. 86.

Board is in accordance with the statute, and the procedure is in accordance with the established practice of the Board as provided for by its rules.[9] The procedure does not satisfy the definition of quasi-judicial procedure as outlined by the Supreme Court of the United States in *Morgan* v. *United States*, 298 U. S. 468, 480 (1936):

> There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . .
>
> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

In respect of the second ground of refusal of declaratory relief: The subject of dispute in the instant case, to wit, the meaning of the collective bargaining agreement, is not pending in another action and is not *res judicata*. It is not pending in another action because the award has been made, and no enforcement proceeding commenced. It is not *res judicata* because the award was not an adjudication of the legal rights and liabilities arising under the agreement. This is not disputed in this appeal, and the discussion just concluded demonstrates it.

As to the existence of another adequate remedy, the third ground for refusing declaratory relief: Assuming that there is a remedy under the Railway Labor Act adequate to protect the rights of the appellant carrier, under Rule 57 of the Rules of Procedure for the District Courts of the United States "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." I discuss in topic IV (1) the question of adequacy of the remedy under the Railway Labor Act.

Concerning the fourth of the grounds above set forth as warranting refusal of declaratory relief: The rights and liabilities involved in the instant case do derive from the common law, that is to say, they are rights arising out of contract, not out of the Railway Labor Act. This is conceded in the instant case, as has been pointed out above, and is confirmed by the fact that before the Railway Labor Act of 1934 was passed, labor agreements of the character involved here were the subject of controversy in the courts under applicable principles of common law and equity and the courts took jurisdiction of their interpretation or enforcement. *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. (2d) 953 (1932); *Panhandle & S. F. Ry. Co.* v. *Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App., 1932); *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Rentschler* v. *Missouri*

[9] R. 40-43.

Pac. R. Co., 126 Neb. 493, 253 N. W. 694 (1934); *McCoy* v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *George T. Ross Lodge* v. *Brotherhood of R. R. Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934); *Gary* v. *Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928); *Long* v. *Baltimore & O. R. Co.*, 155 Md. 265, 141 Atl. 504 (1928).

The fifth ground said by the cases to warrant the refusal of declaratory relief where another procedure or tribunal has dealt or may deal with the case, to wit, that the "special statutory method" or "statutory court prescribed" has been given by the sovereign exclusive jurisdiction, remains for consideration. If Congress intended that the procedure for adjustment of disputes under the Railway Labor Act, including the statutory enforcement proceeding provided by Section 3(p), should be a "special statutory method," or if Congress intended the Adjustment Board to be an exclusive "statutory court prescribed," then the trial court was warranted in dismissing the appellant's complaint seeking declaratory relief.

IV

I am thus brought to a discussion of the question whether by some necessary implication of statutory language there is indicated a Congressional intent that the procedure before the Board and the statutory enforcement proceeding provided by the Railway Labor Act shall be exclusive. In this aspect of the case it is contended that: (1) the Labor Act provision of an enforcement proceeding in the District Courts implies that there should be no other access to courts for carriers for the reason that this statutory suit is adequate protection for them; (2) employees who fail to win an award by the Board are themselves disabled to have recourse to the courts; this implies that the carriers may not proceed in court except by defense to the statutory enforcement proceeding; (3) the provisions of the Labor Act imply an intention by Congress that the remedy under the Act shall be exclusive, for otherwise the employees will be deprived of procedural advantages afforded by the statutory remedy; (4) judicial construction of analagous language in the reparations provision of the Interstate Commerce Act and of the Packers and Stockyards Act requires the conclusion that the provisions of the Labor Act imply that the procedure and remedy thereunder are exclusive; (5) judicial construction of provisions for review of orders of the Securities and Exchange Commission, the Communications Commission, and the National Bituminous Coal Commission, requires the conclusion that the provisions of the Labor Act imply that the procedure and remedy thereunder are exclusive; and (6) it is a necessary implication of the provisions of the Labor Act that the remedy under Section 3(p) is exclusive, for otherwise recourse to the courts by carriers would increase litigation and would render the Act unworkable.

(1) The argument under this contention is that an award and order of the Adjustment Board impose no legal compulsion upon the carrier, so that until the statutory suit is brought and won by the employees the carrier's rights remain unaltered; therefore the carrier can afford to wait, and is adequately protected if and when the employees bring suit. I think this contention is not supportable. An award under the Labor Act may take the form not of an order for

the payment of money but of a finding that a claimant group is entitled to do certain work. Such a finding in effect serves notice on a carrier that it may, as the result of the statutory suit which the employees are empowered to bring, be required to change its operating practices, with the consequence not only of thus assigning the work described in the award to the claimant group but also of taking it away from others—since the claim on which such an award is based would not be made unless others were already performing the work in question. That is the type of award in the instant case. Thus the appellant is faced with a dilemma: On the one hand, if it disobeys the award and order and awaits the suit of the employees and loses that suit, it will then be obliged to pay the accumulated demands of the employees for the work which they in the meantime will not actually have done, together with the wages of the road engine crews of the Tenant Lines, who in the meantime have been performing the train movements in question. That the expense of the service of the road engine crews of the Tenant Lines in performing the train movements in question is ultimately borne by the appellant appears inferentially in the facts and is stated in the appellant's brief on appeal and not disputed by the appellees, and was admitted by the appellees in their third defense below.[10] In the mean-

[10] While it is not in terms alleged in the complaint that the expense of the services of the road engine crews of the Tenant Lines in performing the switching service involved in the case is ultimately borne by the appellant, this fact may be reasonably inferred from the allegations that the train movements in question in the case have been performed by the road engine crews of the Tenant Lines since the commencement of the operation of the Terminal in 1907 where, in the judgment of the managing officers of the appellant, efficiency and promptness in the operation of the Terminal is thereby promoted. Moreover, the brief of the appellant states (p. 62) that as a result of the award it is "faced with the alternative of either so readjusting its practices as to comply immediately with the award, irrespective of its legal correctness, which may involve a large increase in the expenses of operation, or, on the other hand, if it waits until suit is brought and then loses in court, it will have to pay back wages to the claimant employes for the work which it should have permitted them to perform, in addition to the wages which in the meanwhile it must pay to the other employes who are actually doing the work." And again, in further discussion of the dilemma in which the appellant under the facts finds itself, the appellant's brief (p. 65) states: "If it proceeds immediately to put into effect the award of the Board it must displace the persons whom it is presently employing. These persons, who are not treated by the Board as necessary parties in the proceeding before it and who cannot under the statute be forced into those proceedings, are entirely free to institute suit in the courts against the carrier on their own contract, and in such a suit the courts may sustain their right to do the work in dispute. If they do so, then they are of course entitled to payment during the period in which they were displaced through the carrier's compliance with the award." These statements are not denied in the appellees' brief.

In the third defense the appellees, as defendants below, stated: "The practice of the plaintiff, which gave rise to the dispute in question, was and is to permit and require the train crews of the Tenant Lines to use the said road engines in the moving of empty and loaded cars and trains of cars from place to place in the yards of the plaintiff, when such movement does not constitute a portion of any through train run, but does constitute a switching service in the said yards.

"The defendants say further in this connection that at present, and for a long period of time in the past, the plaintiff and the Tenant Lines have recognized that the services described above are properly services of and for the plaintiff, and which it could be required to render. It has been, and now is, the practice to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services."

time also the appellant will have subjected itself to the risk of strike by its own employees. For it is contended by the appellant and not disputed by the appellees in their brief on appeal, and it was stated by the appellees in the trial court,[11] that the primary sanction of an award in favor of employees is not the statutory enforcement proceeding provided in the Labor Act, but the economic bargaining power of the employees. On the other hand, if the appellant obeys the award and changes its operating practices, it subjects itself to the danger of suit for breach of contract by the road engine crews of the Tenant Lines, who will thus have been deprived of the work which they have been performing. So long as the appellees do not bring the statutory suit this dilemma will continue unsolved—in the absence of a declaratory judgment. Nothing but the latter, unless the employees sue—and the appellant has no means of compelling them to sue—can determine the rights of the parties under the agreement of February 1, 1923, and thus enable the appellant, if necessary, to make present readjustments of its operating arangements so as to fulfill its obligations to the appellees at less expense than by incurring the penalty payments which they are now demanding. Therefore the argument that the statutory remedy is exclusive by implication because it adequately protects the carrier's interest is not sound. On the contrary of the carrier's being given by the statute the protection to which it is justly entitled, it is exposed to consequences which it is the purpose of legal institutions to avoid, to wit, coercion without such legal recourse as will afford a reasonably prompt judicial determination of rights and relief from the hazards of conflicting demands.

The appellees rely upon *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160 (1927), and *Federal Trade Commission* v. *Maynard Coal Company*, 57 App. D. C. 297, 22 F. (2d) 873 (1927). In the first of these cases the Federal Trade Commission had served a notice on companies in the coal, steel, and related industries ordering them to furnish the Commission with monthly reports concerning costs of production and the like. The Commission was acting under Sections 6 and 9 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717, 721, 722), empowering it to gather and compile information concerning companies engaged in interstate commerce and to require the filing of reports or answers to specific questions, and giving the Commission power to require the production of documentary evidence. The companies disregarded the

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[11] It was stated in the Memorandum Brief filed by the appellees in the trial court and made a part of the record on appeal that: "The review process adopted was not the result of a haphazard selection, but forms an integral part of the whole Congressional plan. That plan, as we have seen, has its cardinal principal that the parties should be given every inducement to agree upon a practicable settlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No *legal* compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees. Suit may be brought at any time within two years, thus affording ample opportunity for adjustment by agreement." R. 102-3.

To the effect that the economic bargaining power of the employees is the primary sanction of the awards of the Board see also "The National Railroad Adjustment Board," by William H. Spencer, University of Chicago Press, 1938, pages 52-59 inclusive, where the author discusses the nature and enforcement of awards. See in particular page 56.

orders and filed in a United States District Court (the then Supreme Court of the District of Columbia, now the District Court of the United States for the District of Columbia) a bill alleging that the Commission had exceeded its powers and praying for an injunction against the effectiveness of the orders. The Federal Trade Commission Act in Section 10 (38 Stat. 723) provided penalties for failure to file the reports, but the penalties were not effective until thirty days after notice of default, which in this case had not been given. The only method provided by the statute for enforcement of the Commission's orders was, under Section 9, the institution by the Attorney General upon the request of the Commission of a mandamus action, and, under Section 10, the institution under the direction of the Attorney General of a proceeding in a District Court to recover the penalties. The District Court granted the injunction and this was affirmed by the Circuit Court of Appeals (the then Court of Appeals for the District of Columbia, now the United States Court of Appeals for the District of Columbia). On appeal by the Commission to the Supreme Court of the United States the lower courts were reversed. The Supreme Court held that there was nothing that the Commission could have done to secure enforcement of the challenged orders, except to request the Attorney General to institute proceedings for mandamus or to supply him with the necessary facts for an action to recover the penalties, and that therefore until the Attorney General acted the companies could not suffer, and that when he did act they would then have full opportunity to contest the legality of any prejudicial proceeding against them, and that that right to contest was adequate and that hence they were not in a position to seek relief by injunction. In *Federal Trade Commission* v. *Maynard Coal Company* a similar question was presented, except that in that case the thirty-day notice had been served and the penalties were therefore running, although again no action had been taken by the Attorney General. The ruling followed the decision in the Supreme Court just discussed. But these two cases are not relevant to the instant situation. The orders involved were mere orders to file reports. They were made by the Federal Trade Commission acting as an arm of Congress to secure information for legislative purposes. They involved no contract rights and no adjustment of a dispute arising out of contract rights as does the instant case. Also, the orders were enforceable only upon the action of a governmental authority, to wit, the Attorney General, rather than being left, as is an award and order of the Adjustment Board, to the sanction of the economic bargaining power of an adversely interested private party, or to enforcement proceedings optional to such a party.

(2) Under this topic it is said by the appellees that one who has elected to pursue an administrative remedy is bound by the result, and for this reason and also because the statutory enforcement action provided by the Labor Act is available only to one who wins an award, the employees who fail to win an award are without further recourse, that is, may not themselves invoke the jurisdiction of the courts. Hence, argue the appellees, it is implied that the carriers may not proceed in court except by defense to the statutory enforcement proceeding. Assuming, *arguendo*, that the position taken by the ap-

pellees—that employees who fail to win an award before the Board cannot have access to the courts upon the collective bargaining contract itself out of which a dispute grows—is correct, it is I think irrelevant to the further question whether or not the procedure before the Board and the statutory enforcement proceeding afforded by the Labor Act are exclusive so far as a losing carrier is concerned. It would seem more logical to conclude that it could hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board. Indeed the argument that the carrier cannot have recourse to the courts because employees losing before the Board cannot sue either under the Act or at all begs the very question in issue, to wit, whether the procedure provided for by the Labor Act is exclusive.

(3) The contention that the language of the Labor Act implies an intent by Congress that the statutory enforcement proceeding provided for therein shall be exclusive, for otherwise the employees would be deprived of procedural advantages afforded by the statutory remedy, is based upon those portions of Section 3(p) of the Act having to do with the selection by the employees of a forum, the allowance to them of attorney's fees and costs, and of a two-year period of time within which they may commence the statutory suit. The argument here made would conceivably be appropriate before Congress against the enactment of a declaratory judgment statute, but it has no more relevance to the instant case than to any other case. For it is a necessary consequence of the declaratory judgment procedure that it shall deprive a defendant of special advantages that he might have obtained by acting first and suing as plaintiff. It is the purpose of the Declaratory Judgments Act to enable a plaintiff to relieve himself of embarrassments arising from the failure of his opponent to make the declaratory judgment plaintiff a defendant in another proceeding. In any declaratory judgment suit brought to determine rights not yet sued upon by the defendant as plaintiff, the declaratory judgment suit plaintiff may choose to sue in the residence of the defendant, who might himself, had he brought action as plaintiff, have chosen another forum. In respect of attorney's fees and costs—many contracts provide for these in the event of suit by one of the parties. But the opposite party can cut off this advantage if, in a declaratory judgment action first brought to determine the rights and duties under such a contract, he obtains a determination that he has no duty. So in respect of the statute of limitations, a potential defendant occupying a situation which may be the proper subject of a declaratory judgment action may, by commencing such an action prior to the bringing of suit by the potential plaintiff upon his claimed cause of action, cut down the statute of limitations applicable thereto. Thus it is apparent that the objection made in this aspect of the case to the declaratory judgment procedure is an objection to that procedure generally. If it applies here it must apply generally. If it does not apply generally, it cannot be urged here unless the statutory remedy under the Labor Act, including its special venue, attorney's fees and costs, and statute of limitations provisions, is exclusive—which is the very question in issue. If the remedy is exclusive there is no need to rely upon the objection. If it is not exclusive, the objection fails.

(4) Equal justice requires that similar terms of statutes enacted for like purposes should have like interpretations. In respect of proceedings in courts to enforce reparations orders made in favor of shippers and against carriers under Section 16(1), Section 16(2) of the Interstate Commerce Act (34 Stat. 590 (1906), as amended by 36 Stat. 554 (1910), 36 Stat. 1167 (1911), and 41 Stat. 491 (1920)) provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

There is a similarly worded provision in the Packers and Stockyards Act, Section 309(f) (42 Stat. 166 (1921)). The appellees urge that under judicial interpretation of these statutes the enforcement proceedings provided for are exclusive, and the appellees say that Section 3(p) of the Labor Act is similarly worded and should be similarly construed.

I do not read the cases as holding that the reparations remedy of the Interstate Commerce and Packers and Stockyards Acts is exclusive in the sense in which that term is being used in the instant case. In *Brady* v. *Interstate Commerce Commission*, 43 F. (2d) 847 (N. D. W. Va. 1930), affirmed 283 U. S. 804 (1931), a shipper attempted to obtain an order setting aside and correcting findings made by the Commission in a reparations suit and requiring the Commission to make a supplemental order on the basis of the corrected findings. The action was brought in a United States District Court, under 36 Stat. 539 (1910), as amended by 38 Stat. 219 (1913), as one "to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission," and a special court of three judges was asked for under the Urgent Deficiencies Act (38 Stat. 220 (1913)). But it was held that the action must fail, first because it was not brought to set aside an order of the Commission but only to correct alleged errors in the findings on which the order was based, and second because a reparations order of the Commission was not within the class of orders which Congress intended might be enjoined under the Urgent Deficiencies Act in a three-judge court. *Baltimore & O. R. Co.* v. *United States*, 87 F. (2d) 605 (C. C. A. 3d, 1937), also held that a three-judge District Court has no jurisdiction to enjoin a reparations order of the Interstate Commerce Commission. But these two cases, in holding that the remedy of injunction by a three-judge court is not available to a shipper against a reparations order of the Commission, hold nothing concerning the exclusiveness of the reparations remedy so far as other recourse to the courts by either shipper or carrier is concerned. In *Baltimore & Ohio R. Co.* v. *Brady*,

288 U. S. 448 (1933), relied upon by the appellees, an action was brought by a shipper against a carrier in a United States District Court in consequence of the failure of the carrier to comply with a reparations order of the Interstate Commerce Commission for damages found to have been sustained by reason of discrimination by the carrier in furnishing cars for the transportation of coal from the shipper's mine. The action was brought under Section 16(2) of the Interstate Commerce Act to enforce the Commission's order made under Section 16(1). In this suit the shipper sought and obtained judgment for a sum greater than the reparations award of the Commission. This judgment was affirmed in the Circuit Court of Appeals, but on certiorari to the Supreme Court there was a reversal. The Supreme Court pointed out that while Section 3 (24 Stat. 380 (1887)) of the Interstate Commerce Act makes it unlawful for a carrier to subject any person or traffic to unreasonable disadvantage, and while Section 8 (24 Stat. 382 (1887)) imposes upon carriers liability for the full amount of damage sustained in consequence of a violation of the Act, and while under Section 9 (24 Stat. 382 (1887)) a person so injured may either make a complaint to the Commission (under Section 16(1)) or bring suit for damages in a District Court, such a person, because of the further provisions of Section 9, "shall not have the right to pursue both remedies, and must select which method he will adopt." (288 U. S. at 456) And the Court held that the shipper, having elected to seek relief through the Commission under Section 16(1) and (2) was not entitled to recover more than the amount of the award made under that section. *Terminal Warehouse Co.* v. *Penna. R. Co.*, 297 U. S. 500 (1936), and *Western New York & Penn. R. Co.* v. *Penn. Refining Co.*, 137 Fed. 343 (C. C. A. 3d, 1905), *affirmed*, 208 U. S. 208 (1908), also cited by the appellees, reflect the same rule as that laid down in the case just discussed. But these three cases rest upon the provisions of Section 9 of the Interstate Commerce Act which confers an election of remedies upon the shipper. They hold nothing concerning the exclusiveness of the statutory remedy so far as the carrier is concerned. *Minds* v. *Pennsylvania R. Co.*, 237 Fed. 267, 270 (E. D. Penn. 1916), *affirmed*, 244 Fed. 53 (C. C. A. 3d, 1917), and 250 U. S. 368 (1919), cited by the appellees for the statement therein contained that "the complainant, being a volunteer, is concluded by what the [Interstate Commerce] Commission does,"—from which the appellees draw the inference that if the shipper fails to win an award he has no recourse to the courts—is but dictum so far as that statement is concerned, because on the facts of the case the shipper prevailed. No cases are cited and I know of none which construe the reparations provision of the Packers and Stockyards Act in respect of exclusiveness.

But even assuming the existence of a judicial interpretation of the reparations provisions of the Interstate Commerce Act and the Packers and Stockyards Act to the effect that the reparations remedy is exclusive, in the sense that it forbids other recourse to the courts by either shipper or carrier, such an interpretation would, because of dissimilarity between the provisions and purposes of those two acts on the one hand and of the Railway Labor Act on the other, have no persuasive value in the instant case. The Labor Act contains no

section expressly requiring an election of remedies. Again, the reparations remedy of the Interstate Commerce Act and the Packers and Stockyards Act is made available only in case of non-compliance of the carrier "with an order for the payment of money," whereas the remedy provided by Section 3(p) of the Labor Act is available in respect of any order of the Adjustment Board, including a direction to a carrier, as in the instant case, in respect of its operating practices. As has been pointed out in part (1) of this topic IV, the award in the instant case in effect says to the appellant that it must henceforth permit certain men, to wit, the appellees, to perform certain train movements, and thereby not allow other men to do that work. A legal proceeding to compel obedience to an award of this kind is much different in its incidents and consequences from a suit to recover money; and the grounds on which it might be held that a statutory action to recover money is by implication exclusive of all other forms of judicial relief, would have no necessary relevance to the question whether or not a statutory proceeding to enforce a claim to do certain work is exclusive. Still further, an interpretation of exclusiveness in the reparations remedy of the Interstate Commerce Act and the Packers and Stockyards Act would lack persuasive value in the instant case because the rights involved are different from those involved under such Acts. In the instant case the rights are common law rights arising out of a contract; under each of the other two Acts the rights are of a statutory character—the right to be charged in accordance with a schedule of rates—the right not to be made the subject of unreasonable preferences or prejudices. In respect of rights so created and assigned to the protection of a given tribunal, it might well be held that a special remedy provided by statute for enforcement of the rights was exclusive. Such a conclusion does not follow in the instant situation where the Adjustment Board has no authority to make a determination of contract rights as such, but only to adjust disputes arising out of the interpretation or application of collective bargaining agreements. Still further, the assumed judicial interpretation of exclusiveness in the reparations remedy of the Interstate Commerce and Packers and Stockyards Acts would not be persuasive in the instant case for the reason that the proceeding before the Adjustment Board differs vitally in nature from that before the Interstate Commerce Commission and the Department of Agriculture. The proceeding before these bodies is quasi-judicial in nature. It has been demonstrated above that this is not the case in respect of the Adjustment Board proceeding. I conclude that the rule that similar terms of statutes enacted for like purposes should receive like interpretation is inapplicable to the statutes compared in the instant case, "because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different." *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 330 (C. C. A. 8th, 1907), *certiorari denied*, 209 U. S. 544 (1908).

(5) The judicial decisions in respect of review of orders of the Securities and Exchange Commission, the Federal Communications Commission, and the National Bituminous Coal Commission cited by the appellees for the proposition that where a statute establishing an administrative tribunal provides an adequate method of review in the courts for its orders, such method is exclusive, and urged by the appellees as requiring the conclusion, by parity of reasoning, that

the provisions of the Labor Act imply that the statutory enforcement proceeding thereunder is exclusive, are *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441 (C. C. A. 2d, 1937); *Sykes* v. *Jenny Wren Co.*, 64 App. D. C. 379, 78 F. (2d) 729 (1935), *certiorari denied*, 296 U. S. 624 (1935); *Monocacy Broadcasting Co.* v. *Prall*, 67 App. D. C. 176, 90 F. (2d) 421 (1937); and *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 69 App. D. C. 333, 101 F. (2d) 426 (1938), *affirmed*, 306 U. S. 56 (1939). In *Securities and Exchange Commission* v. *Andrews* the Commission had filed a bill of complaint in a United States District Court under Section 21(e) of the Securities and Exchange Act of 1934 (48 Stat. 881, 899), to enjoin the defendants—Andrews and others—from violating the provisions of Section 9 (48 Stat. 889) with respect to stock of Dictograph Products Company. While the suit was pending upon the bill, answer, and the Commission's motion for a preliminary injunction, the Commission made an order pursuant to Section 21(a) (48 Stat. 899) of the Act for an investigation to determine whether to suspend unlisted trading privileges in Dictograph stock pursuant to Section 12(f) (48 Stat. 892), as amended (49 Stat. 1375 (1936)); and a subpoena duces tecum was issued by a Commission investigating officer directing the Company to appear before him. Thereupon the defendants filed a cross-bill of complaint to enjoin the Commission and its agents "from all activity with respect to" Dictograph stock. The trial judge dismissed the cross-bill for want of jurisdiction and want of equity. The Circuit Court of Appeals affirmed on the ground that the trial court was without jurisdiction to entertain the cross-bill, the theory of the decision being that a suit against the Commission, an administrative agency of the United States, can be maintained only in the courts and upon the terms specified in the statute. The court pointed out that Section 25(a) (48 Stat. 901) of the Securities and Exchange Act provides that "any person aggrieved by an order issued by the Commission . . . may obtain a review of such order in the Circuit Court of Appeals."[12] It held that the order to appear before the investigator was interlocutory and not reviewable under Section 25, but that even if it were reviewable, review could be had only in the Circuit Court of Appeals. But the case is not apposite, for the instant case is not a suit against the National Railroad Adjustment Board. Moreover, the statutory appellate procedure afforded under the Securities and Exchange Act is available to both parties. Still further, the Securities and Exchange Commission is a governmental body whose hearings are of a quasi-judicial nature. Similar distinctions are to be taken in respect of *Sykes* v. *Jenny Wren Co.*, *Monocacy Broadcasting Co.* v. *Prall*, and *Utah Fuel Co.* v. *National Bituminous Coal Commission*.

(6) In respect of the last argument in this aspect of the case—that it is a necessary implication of the provisions of the Railway Labor Act that the remedy under Section 3(p) is exclusive for otherwise recourse to the courts by a carrier would increase litigation and

[12] Section 25(a) provides: "Any person aggrieved by an order issued by the Commission . . . to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

would render the Act unworkable: It is not to be doubted that if there is access to the courts for declaratory relief, carriers which, in view of a contract entered into with employees, regard an Adjustment Board award as unjust, will seek relief in the courts where the statutory suit is not promptly brought by the employees. And it is not to be doubted that this will in some degree lessen the effectiveness of awards which might otherwise be enforceable through the sanction of economic bargaining power. But the argument is one to Congressional intent. It is urged that the Adjustment Board is adapted to the settlement of disputes growing out of collective bargaining agreements between carriers and their employees, and that it has performed its function of settling such disputes with a high degree of success. It is asserted that an interpretation of a statute which must lead to weakening the success of an agency created by it is inadmissible if the statute is susceptible of another interpretation by which such a consequence can be avoided, for Congress will not be presumed to have intended a nugatory thing. 59 C. J. 961-4, § 571. But it is also cardinal that Congress will not be presumed to have intended a mischief or injustice. 2 Sutherland, Statutory Construction (2d ed. 1904) §§ 488-90; 25 R. C. L. 1022, § 258. And if a choice must be made between an interpretation which would lessen the effectiveness of a statute and one which would result in unfairness, the former ought to prevail, for it ought not to be taken that Congress would intend to gain an end at the price of fairness. Such I think would be the consequence of the interpretation of the statute urged here by the appellees. For the consequence of the conclusion that recourse to the courts for a determination of the meaning of a collective bargaining contract between a carrier and its employees was not intended is that Congress did intend to set up a system of compulsory arbitration whereunder either party to a dispute arising out of a collective bargaining agreement could force the other into a proceeding before the Adjustment Board, and whereunder the award, when made, would be immunized against judicial relief unless the employees, having won, elected to bring a statutory enforcement proceeding instead of relying upon their economic bargaining power as the primary sanction of the award. And the further consequence is that Congress intended to give the Board in effect final power to determine contract obligations—since the disputes which it is to consider are of a legal nature "growing out of the interpretation or the application of agreements" (Section 2)—notwithstanding the fact that the Board is concededly an adjustment board rather than one to adjudicate legal rights and obligations, and notwithstanding that if the Board, rather than giving effect to the actual legal obligations of a contract, should disregard them, the award would in effect abolish actual obligations and substitute new ones, thus reducing collective bargaining agreements to virtual nullity—a result as unfortunate for employees as for carriers. Thus to hold that the statutory remedy must be construed as excluding other forms of judicial relief in order to make the provisions of the Railway Labor Act workable would require giving a definition to workable which Congress cannot be presumed to have intended.

I think it is not warranted to hold that the Railway Labor Act provisions necessarily imply an intent to deny right of access to

the courts except in the enforcement proceeding of Section 3(p) because if not thus interpreted the effect will be, as the appellees urge, to increase litigation. The establishment of collective bargaining has resulted in the execution of a very large number of contracts between carriers and their employees governing rates of pay, rules and working conditions. These contracts, being the source of rights and obligations of importance to the parties, will inevitably lead to litigation. This Congress must be taken to have understood.

I thus conclude that by no necessary implication of statutory language is there indicated a Congressional intent that either the procedure before the Board or the statutory enforcement proceeding provided by the Railway Labor Act of 1934 shall be exclusive. *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630 (1941), although not directly in point on the facts for the reason that therein there had not been, as in the instant case, recourse to the Adjustment Board and an award and order, nevertheless interprets the Labor Act in a manner which I think tends to confirm the conclusion I reach. In that case the petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against the respondent Railroad Company, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the Company. Originally commenced in the state courts, the action was ultimately removed to a United States District Court, which rendered judgment against the Company; but this was reversed by the Circuit Court of Appeals. *Inter alia*, the Company contended that the judgment in its favor should be sustained because both the District Court and the Circuit Court of Appeals "erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act . . .." But the Supreme Court held otherwise. It said:

> . . . But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to § 153(i) [Section 3(i), 48 Stat. 1191], which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." . . . It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Adjustment Board . . . ." It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . . ." This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. . . . [312 U. S. at 634-6]

The appellees cite *Railroad Yardmasters of North America, Inc.* v. *Pittsburgh & Lake Erie Railroad Company*, 39 Fed. Supp. 876 (D. C. N. D. Ohio, 1940). In that case the individual defendants had obtained favorable awards from the National Railroad Adjustment Board, Fourth Division, granting them a higher status on a yardmasters' seniority roster in the East Youngstown yard. Compliance with these awards by the Railroad would place other employees whose names appeared on the same roster in a less favorable seniority position. The Railroad Yardmasters of North America, Inc., on behalf of employees whose seniority rights would be thus adversely affected, filed a complaint for a preliminary injunction enjoining all of the defendants from putting the award into effect, and prayed upon final hearing a permanent injunction. The complaint asserted that in making the awards the Board acted without jurisdiction and that its proceedings were in violation of the statutes establishing it and governing its procedure. The answers of the individual defendants asserted that the court had no jurisdiction, and on this ground the court dismissed the complaint. The theory of the decision was that the enforcement proceeding provided for by Section 3(p) of the Railway Labor Act was exclusive, and that no indirect review or collateral attack of the Board's awards, such as was sought in the complaint, was permissible. This case, although it involves a form of action different from that in the instant case, is nevertheless contrary, so far as its *ratio decidendi* is concerned, to the position I take herein. But I think it not persuasive. On the contrary, in my opinion, it illustrates the unfortunate results attendant upon a conclusion that the Railway Labor Act provides an exclusive remedy for determining disputes arising under agreements between carriers and their employees. If the Railroad was willing to comply with the awards—which it apparently was, in view of the injunction suit—there would be no necessity for the successful seniority right claimants to institute an enforcement proceeding under Section 3(p), and yet the Railroad's compliance with the awards might diminish or destroy the rights of other employees, and this whether or not they were given notice of the proceedings before the Board or an opportunity to be heard. And since under the decision of the District Court they are forbidden access to the courts, except in the event of an enforcement proceeding, they are effectually denied all judicial determination of their rights.

V

Is there some implication of legislative history to the effect that exercise of declaratory judgment jurisdiction of the United States District Courts is forbidden in such cases as the instant case because the procedure before the Board and the statutory remedy provided for in the Railway Labor Act of 1934 are exclusive? I find none. The Reports of the House and Senate Committees recommending the bill which became that Act (H. R. Rep. No. 1944; Sen. Rep. No. 1065, 73rd Cong., 2d Sess., 1934) show it to be an outgrowth of the Railway Labor Act of May 20, 1926 (44 Stat. 577) and indicate that it was designed *inter alia* to correct two defects in that Act: one, the pos-

sibility left open by the language of the 1926 Act that adjustment boards would cover only a part of the national railroad system; the other, the contingency of a deadlock. The House Committee Report stated:

> The second [13] major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as "grievances", which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions. The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.
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> Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows:
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> (*g*) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached.

While the foregoing language makes clear that the Committee regarded the compromise or adjustment, through the means provided, of minor disputes known as "grievances," arising from the interpretation of collective bargaining agreements between carriers and their employees, as desirable, it neither expresses nor implies disparagement of the right of judicial determination of legal issues. The Supreme Court in *Pennsylvania R. R.* v. *United States Railroad Labor Board*, 261 U. S. 72, 84 (1923), said of an earlier adjustment board (the adjustment board established under title III of the Transportation Act of 1920):

> But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to

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[13] The Report states the purposes of the bill to be: "1. To prohibit any interference with freedom of association among employees and to prevent the denial of the right of employees to join a labor organization as a condition precedent to their employment. 2. To provide for the complete independence of carriers and of employees in regard to self-organization in order to carry out the purposes of this act. 3. To provide for the prompt and orderly settlement of all disputes growing out of grievances and out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, so as to avoid any interruption of commerce or of the proper operation of any carrier engaged therein."

coöperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. . . .

Undoubtedly the function of the Board in facilitating compromise of disputes is useful and important, but it is not to be implied from an indication by the Committee that settlements are desirable or from the fact that Congress set up an agency of adjustment, that it was the intention of Congress to forbid the adjudication of legal rights by the courts.

No intention to affect or change the provisions defining the nature and functions of the National Railroad Adjustment Board appears in the legislative history. Under the 1934 Act a group of carriers and their employees may still establish a separate board, and if they do so, the National Board has no function in respect of disputes which are subject to the separate board. The language of the 1934 Act concerning the functions of the National Board is substantially that of the 1926 Act except that the latter said that disputes "shall be referred" whereas the 1934 Act says "may be referred" to the Board. I think it clear from the parallelism between the two Acts that the function and place of the 1934 Board were intended by Congress to be identical with the function and place of the adjustment boards under the 1926 Act. This is confirmed by the statement of the Supreme Court quoted *supra* from *Moore* v. *Illinois Central Railroad Company*. And there has been no suggestion in the instant case that there was any intention by Congress under the 1926 Act to substitute adjustment board proceedings for those of the courts, that is, to deny to parties to adjustment proceedings access to the courts for the determination of their legal rights under collective bargaining agreements out of which disputes have arisen.

Not only do I find no indication in the legislative history in respect of the 1934 Act as a whole of an intention to make the Adjustment Board and its procedure exclusive, but also I find no legislative history indicating that Congress intended that the special statutory suit made available under the 1934 Act to employees who have succeeded in obtaining a favorable award, was intended to be an exclusive remedy and thus to cut off access to the courts for the carriers for declaratory or other relief. There is no reference in the Committee Reports on the 1934 Act, or in the discussion on the floor, to the statutory action provided for by Section 3(p); and neither of the Reports mentions Section 3(p) as introducing any change over the 1926 Act. And yet if that section forbids access to the courts in other forms of action, the 1934 Act represents a serious change over the 1926 Act. It would seem likely that, if it had been the intention of the Committees to accomplish such a change, they would have said so.

VI

It is a settled rule of statutory construction that courts will if possible avoid such an interpretation of a statute as will raise serious doubts as to its constitutionality. I think the construction which the appellees put upon the Railway Labor Act would threaten its validity. For the position of the appellees can hardly be limited to

declaratory relief. The argument is that Congress has made the adjustment procedure and statutory enforcement proceeding, in the event of an award, exclusive. The consequence must then be that there is no access to the courts whatever either for damages or by way of injunction or for declaratory relief. The last is but remedial. Declaratory judgments statutes add nothing to the substantive jurisdiction of the Federal courts. *Aetna Life Ins. Co.* v. *Haworth* and *Aetna Casualty & Surety Co.* v. *Quarles*, both cited *supra*. There is of course no constitutional right to a declaratory judgment as such, but if the Labor Act is construed to bar all judicial relief to the carrier party to a collective bargaining agreement this would deny the carrier due process of law, since deprivation of remedy in the courts would destroy the character of collective bargaining agreements as contracts for the carrier. For the reasons stated in topic IV (1), the remedy afforded the carrier by way of defense to the enforcement proceeding available to employees only under Section 3(p) is in effect no protection. "Without the remedy"—meaning an adequate remedy—"the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable." *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552 (U. S. 1866). Therefore a contract right will have been taken without due process of law.

It is elementary constitutional law that when the legislature provides a remedy but interposes such conditions precedent to its availability that the hazards and burdens incident to its use can reasonably be expected to deter resort to it, the courts will provide relief in an appropriate proceeding even though the statutory remedy is plainly intended to be exclusive. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). In the instant case the power to institute judicial proceedings under the remedy provided in Section 3(p) is placed solely in the hands of the other party to the controversy, to wit, the appellees. The appellant is powerless under the statute to take action itself to set in motion the judicial machinery said to be available to it for relief. And in the interval it is subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what is to be expected from reasonable persons, it is apparent that it will prefer not to wait but to yield. Under such circumstances the judicial remedy apparently held out by the language of the statute is illusory. It is denied by the actualities of the situation of the parties.

A further constitutional threat to the statute through the appellees' construction of the Labor Act is this: If the hazards of waiting for employees to bring the statutory action are so serious and deterrent that a carrier has no choice in actuality but to obey the award of the Board, then the result in effect is to give the Board final authority to determine contract rights. That is an exercise of judicial power. There can be no valid delegation of governmental power to non-governmental agencies. *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936). The Adjustment Board, consisting of bi-partisan groups paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

In summary, I am of the opinion that: The appellant's complaint states a case appropriate for the exercise of declaratory judgment jurisdiction of a United States District Court. No expression of Congressional intent, no principle or policy of law, no necessary implication of statutory language or of legislative history, forbids exercise of the jurisdiction under the circumstances of the instant case. Under the due process clause of the Fifth Amendment the courts are open to all who present a controversy which is the proper subject of judicial action. No impediment to the appellant's action appearing, the trial court should not have dismissed the complaint.

[fol. 382] Tuesday, November 18th, A. D. 1941.

No. 7465, October Term, 1941

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL et al.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. Justice Rutledge.

November 18, 1941.

Dissenting opinion by Mr. Justice Stephens.

[fol. 383] United States Court of Appeals for the District of Columbia. Filed Jan. 30, 1942. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1939

No. 7465

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.

3. Opinion of the Court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

John Dickinson, Counsel for The Washington Terminal Company.

[fol. 384] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI AND CERTIFYING TO THE ATTORNEY GENERAL OF THE UNITED STATES THAT THE CONSTITUTIONALITY OF THE RAILWAY LABOR ACT IS DRAWN IN QUESTION—March 30, 1942

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

In view of the Act of August 24, 1937 (50 Stat. 751), the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Railway Labor Act is drawn in question in this cause.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.